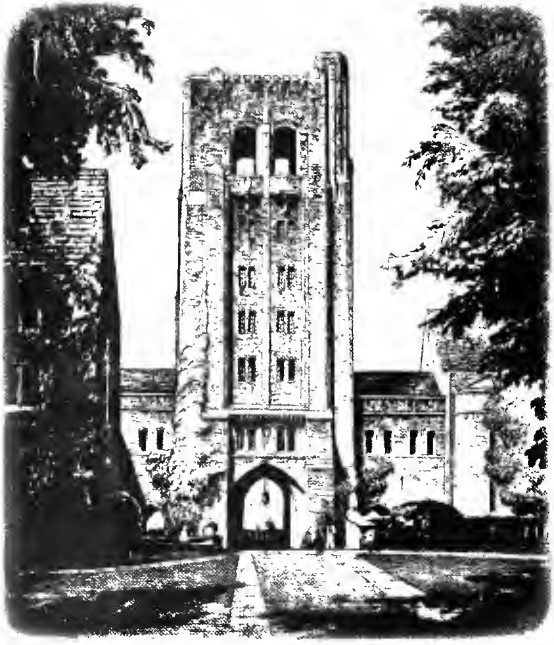

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IN

PARTNERSHIP

WITH ANALYSIS AND CITATIONS.

BY

JAMES PAIGE, LL. M.,

PROFESSOR OF LAW IN THE COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.

PHILADELPHIA:
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Mr. Paige, Lecturer upon the subject of Partnership in the College of Law of the University of Minnesota, has selected and arranged these cases, the work coming under my direct consideration only so far as was necessary that I might observe its harmony with the plan and object of the "Series."

W. S. PATTEE, LL. D.,
Dean of the College of Law.

UNIVERSITY OF MINNESOTA,
MARCH 7, 1894.

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ILLUSTRATIVE CASES

IN THE

LAW OF PARTNERSHIP.

A. HOW FORMED.

1. BY CONTRACT.

ATKINS *v.* HUNT.

Supreme Court of New Hampshire, 1843.

14 N. H. 205.

ASSUMPSIT on three promissory notes, all dated in the year 1840, and payable to the plaintiffs, or order, and signed "Farmers' and Mechanics' Company, by Greenleaf Cummings, Agent."

There were numerous defendants, all of whom were defaulted except two, who severally pleaded the general issue. It was proved that in the month of August, 1839, the defendants signed written articles of association in trade, under the name and style of "The Farmers' and Mechanics' Store." One of the articles provided as follows: "If any stockholder wishes to withdraw from the concern, he may do so, taking the amount by him paid in, by giving six months' notice of his intent, to the executive committee in writing." It was also provided by the second by-law that each subscriber should become a partner, and the defendant was a subscriber

of a certain sum; and article 12 provided that all matters relating to the business of the company should be decided by a major vote of those present at any meeting duly notified, except in relation to certain specified acts.

It was proved that Greenleaf Cummings, who signed the notes, was duly employed from the first of February, 1840, to the first of July, 1841, and acted as agent of the company, provided it shall appear from this case that the company continued its legal existence, and that the notes in suit were given in pursuance of his agency, for goods purchased to be used in the business of the company.

A verdict was taken for the plaintiffs, upon which judgment is to be rendered, or it is to be set aside and judgment rendered for the defendants, according to the opinion of the Court upon this case.

Livermore, for the defendants. The signature of the paper did not make the signers copartners. There was only a proposal to make a partnership. The thing was only inchoate, and they might have withdrawn at any time. They must have paid in a sum of money, in order to be affected by the profit and loss, and until this should be done they could not vote. The mere signature of a proposal to constitute a partnership would not compel the signers to become partners. They did not hold themselves out so as to be treated by the world as partners. Their names were not published as members, nor did they do anything of the character necessary to charge them before the world. A retiring partner is not liable for future debts to those who had no dealings with the firm before he retired: Story on Part. 246.

Morrison, for the plaintiffs. By the first article the parties agreed to become partners, and by the second article they agreed to pay the sums affixed to their names. The first article makes them partners, and the second is only a regulation among themselves. The second by-law provides that each subscriber shall become a partner. A subsequent refusal

to pay what they have subscribed, surely cannot exonerate them from their liability.

GILCHRIST, J. The question before the Court is, whether the defendants are liable as partners of the Farmers' and Mechanics' Company. The plaintiffs allege that they are thus liable, because it appears that they subscribed certain articles constituting that company; that provision was made for the withdrawal of persons from it; that the business of the company was to be managed according to the vote of those present, and that the second by-law provides that each subscriber shall become a partner. These facts it is said render them liable to the world as partners for the performance of the contracts made by their agent, and constitute them actually partners among themselves.

It is said, on the other hand, that what was done amounted merely to a proposition to form a partnership; that no money was paid in, so as to cause them to be affected by any eventual profit and loss; that no names were published to the world, as those of the partners; that the defendants might have withdrawn at any time, and that consequently they could not be bound by the acts of the agent of the company. The question raised by the case is, whether the defendants were actually members of a partnership.

There is of course an essential difference between a mere proposition to form a partnership, and its actual constitution. Persons may take a deep interest in the objects to be accomplished by the company; may make donations to aid its progress; or may sign their names to subscription papers for the same end, without being liable for debts which other persons may contract in the prosecution of the same purpose. But a difficult question often arises, as to where the proposition to make the contract ends, and the contract itself begins. In Bourne *v.* Freeth, 9 B. & C. 632, 17 Eng. Com. Law, a prospectus was issued, stating the conditions upon which the company was formed; that the concern was to be divided into twenty shares, to be under the management of a committee, and ten

per cent. of the subscriptions to be paid in by a certain date. It was held that this prospectus imported only that a company was to be formed, and not that it was actually formed, and that the signature to the prospectus did not indicate to any person who should read it that the signer had become a member of a company already formed. So in a case where all the acts proved and relied on were equally consistent with the supposition of an intention on the part of the defendant to become a partner in a trade or business to be afterward carried on, provided certain things were done, as with that of an existing partnership, it was held that he was not a partner: Dickinson *v.* Valpy, 10 B. & C. 128, 21 Eng. Com. Law, per PARKE, J. And where a prospectus for a company was issued, to be conducted pursuant to the terms of a deed to be drawn up, it was held that an application for shares, and payment of the first deposit, did not constitute one a partner who had not otherwise interfered in the concern: Fox *v.* Clifton, 6 Bing. 776, 19 Eng. Com. Law. It was an important element in that decision, that the deed was not executed by the defendant who was sought to be charged as a partner. In Howell *v.* Brodie, 6 Bing. N. C. 44, 37 Eng. Com. Law, the defendant, from 1829 until 1833 advanced various sums, with a view to a partnership in a market about to be erected; knew that the money was applied toward the erection, and was consulted in every stage. In October, 1833, it was settled by a written agreement that he should have a seventh share of it; but it was held that he was not liable as a partner until October, 1833, although profits had been made but not accounted for to him before that time. Lord C. J. TINDAL mentions the fact that no account of profits was rendered previous to October, 1833, as being in favor of the defendant.

These cases sufficiently illustrate and authorize the general position taken by the defendants, that a mere agreement to constitute a partnership *in futuro* does not make the contracting parties liable as partners. A partnership is a contract, imposing certain liabilities upon its members. Whether

parties have agreed that they will at some future time enter into such a contract, is a very different question from the one whether they have actually entered into the contract. But we are not called upon to make a critical examination of the numerous cases on the subject of partnership which fall within one or the other of these categories, further than to recognize their division into the two classes referred to. Our opinion is that the defendants are clearly liable as partners, for the acts of Cummings. There was an association doing business under a certain name. The defendants signed the articles which constituted this association, the defendants were subscribers, and a by-law provided that each subscriber should become a partner. The business of the company was to be done in pursuance of a major vote of those present, and an agent was appointed, who purchased goods for the use of the company. Here, then, there was not simply an agreement that a partnership should be formed at some future day, but an actual existing reality, a subscription to articles, making a present association, and a by-law designating the subscribers as partners. A right to participate in the profits of a joint concern is one of the tests of a partnership, where a party has fulfilled all the conditions incumbent on him to perform: Fox *v.* Clifton, 6 Bing. 776, 19 Eng. Com. Law; s. c., 9 Bing. 115, 23 Eng. Com. Law, per TINDAL, C. J. The defendants do not appear to have failed in this regard, and upon this case they would certainly be entitled to a share in the profits of the business. It is not necessary that persons should hold themselves out to the world as partners, in order to become liable in that capacity. That is only one mode of charging them, and when that is done it dispenses with the necessity of proving that they actually signed the articles of partnership. In this case, as the defendants were partners in fact, the opinion of the Court is that there should be judgment on the verdict.

Parsons, 4th ed., § 6; Goddard *v.* Pratt, 16 Pick. 412.

CONSIDERATION.

MITCHELL *v.* O'NEALE.

Supreme Court of Nevada, 1869.

4 Nev. 504.

LEWIS, C. J. The examination of this case has conducted us to these conclusions: First. That the evidence is not sufficient to establish a copartnership between the plaintiff and defendant of the general character alleged in the bill. Second. Whether a partnership of any kind were proven or not, the plaintiff made out a case entitling him to an accounting with respect to the operations of the Marysville mill, and therefore that his bill should not have been dismissed.

As it is desirable to dispose of this case upon its merits, we will proceed to give the reasons which have conducted us to these conclusions. Whether a general partnership between the parties existed or not is a proposition not by any means relieved from doubt, for the plaintiff testifies positively, as alleged in the bill, that a partnership was entered into which was to extend to the business of milling and crushing metalliferous rock, and generally to all matters and things which the said defendant might see proper to engage in; but the testimony of the defendant is direct, positive, and unqualified that no partnership agreement of any kind was ever entered into between himself and the plaintiff. Such conflict in the testimony of two persons of unquestioned veracity must necessarily involve the first conclusion arrived at in considerable doubt. The burden of proof, however, is on the plaintiff, and in a case of this kind where it is sought to obtain the legal title to, and possession of, a large amount of property, both real and personal, all the outward evidence of right and title to which is in the defendant, the proof should be very satisfactory indeed to justify a decree such as that sought by this bill. He who claiming an interest in property, yet allows another to take the title in his own name and to treat it as his own for years, cannot complain if when he seeks to establish his right to

such property he is required to make out a strong and satisfactory case. The Courts have ever been averse to disturbing the title of the ostensible owner of real property, except upon clear and weighty proof. The inclination is always to favor the legal title and maintain it in him who holds it. But the testimony on behalf of the plaintiff in support of the partnership falls far short of being satisfactory or convincing. Indeed upon a candid weighing of all the testimony, and placing upon it the most favorable construction possible for the plaintiff, still, whether such general partnership as that attempted to be proven was in fact entered into remains exceedingly doubtful. The very inequality of the original agreement of partnership, accepting it as explained by Mitchell, at once creates the impression that he must have been mistaken as to its character. It appears that all the work and labor were to be performed by O'Neale, whilst the only obligation which the agreement seems to have imposed upon the plaintiff was that of sharing the profits and accepting an equal interest in the property acquired by the efforts of the defendant. The latter was to emigrate to Nevada where he was to enter into any and all kinds of speculations and business which he might deem proper, and without being obliged to furnish any means or doing anything to further the common enterprise, the plaintiff was to have an interest in every transaction entered into, and all property obtained by the defendant. This copartnership agreement, in short, appears to have been nothing more than a promise on the part of O'Neale to give to the plaintiff an equal interest in all the property which he might secure in the State of Nevada. Upon the showing thus made by the plaintiff himself, the contract or agreement was entirely without mutuality, founded upon no consideration, and hence entirely void. Let it be supposed that such a promise was made, and the defendant with the intention of fulfilling it came to Nevada and acquired property, taking the title in his own name, can it be said that upon such a promise the plaintiff could secure a half interest in all such property? We think not; and yet there is little, if anything, else than such a

promise upon which the plaintiff can claim an interest in the property held by the defendant, except the Marysville mill and the Crown Point stock. He advanced money for the purchase of the mill, and it is acknowledged that he was admitted to, or interested in, the stock. But it is not claimed that he furnished any money whatever for the purchase or acquisition of the balance of the property in which he claims to be interested, and hence his interest in it must rest solely upon the agreement testified to as having been entered into in the State of California.

It seems to us the plaintiff's own testimony fails to make out his case, establishing as it does only a naked promise by O'Neale founded upon no consideration. As, however, this point is not made by counsel, we will not rest our decision upon it, but proceed with the consideration of the question as to whether any contract or agreement of copartnership whatever is established by evidence sufficient to justify a recovery by the plaintiff.

Mitchell's testimony, as has already been stated, is positive and explicit that a contract of partnership, as above described, was entered into, and the defendant as positively denies it—and so there is a direct conflict between the parties as to the existence of any contract of partnership whatever. So far as the plaintiff's interest in the Marysville mill is concerned, there is no conflict in the evidence—O'Neale himself testifying that he purchased a quarter interest in the mill, and afterward sold one-half of such interest to Mitchell for a consideration, a part of which was paid before the mill was completed. And this acknowledged interest in the mill will serve to explain many of the expressions employed by the defendant in the letters to which reference will hereafter be made. The very nature of the contract, as stated by Mitchell himself, would doubtless make the evidence thus far preponderate in favor of the defendant; for it is very improbable that any person would enter into a contract so burdensome to himself, and yet yielding him no advantage. There is, however, some other evidence, which it is claimed tends to establish the co-

partnership, and thus to corroborate the plaintiff's testimony. But in our opinion counsel attach more weight to that evidence than it is entitled to. McGowan's testimony does not go beyond showing a joint interest or partnership in the Marysville mill. So, too, with Barbour's. He states explicitly that in the conversation between himself and O'Neale the admission of partnership was confined to the mill. And in the papers and pleadings in the case of Reilly *v.* O'Neale and others, not a syllable appears indicating any community of interest beyond that. Hall's testimony is confined exclusively to the transaction of the purchase of the Crown Point stock, and there is nothing tending to show any partnership connection between the parties in any matter beyond that particular transaction. . . .

And this is substantially all of the plaintiff's testimony to establish the contract of copartnership claimed to have been entered into between himself and the defendant. The plaintiff, it must be admitted, testifies with certainty and clearness, but is corroborated only by the expressions used in the letters, and the exhibit above referred to. On the other hand the defendant as distinctly and positively denies that any contract of partnership was ever entered into between himself and the plaintiff, and his testimony is corroborated by circumstances, not perhaps of any great weight, yet not entirely unworthy of consideration. Although the defendant was constantly engaged in speculations and business transactions of various kinds, and this too with the knowledge of Mitchell, yet no inquiry seems to have been made as to the condition of matters during all that time. So, too, when the plaintiff desired to obtain money from the defendant, without any mention of other property, or inquiry as to the condition of affairs, he mortgaged his interest in the Marysville mill to obtain it of him. Although it is conceded there was no motive for concealing the partnership, yet during the entire period of about six years the plaintiff has failed to show that the defendant either directly admitted, or did any act beyond what we re-

ferred to, recognizing any such partnership. And while Mitchell made frequent inquiries with respect to the Marysville mill, he seems never to have given the other business or transactions in which he now claims to have been interested a single thought. Such circumstances, although not leading directly to the door of truth, are inconsistent with the existence of the general partnership claimed to be existing between these parties. It is not natural that man should be so utterly indifferent about matters of this kind, and by his frequent inquiries about the Marysville mill property, it is at least rather evident that such indifference is not a characteristic of the plaintiff. The direct testimony of the defendant, corroborated in some degree by these and many other circumstances of like character, which are found in the record, to say the least, renders the existence of the general partnership, testified to by the plaintiff, a matter of doubt. So much so certainly that it cannot be held that the plaintiff, upon whom the burden of proof rests, has established it by such a preponderance of evidence as to authorize the reversal of the judgment and finding which were against him in the lower Court.

But notwithstanding the testimony does not establish the contract of partnership which forms the foundation of the plaintiff's cause of action, yet the evidence, very satisfactorily, to our mind, makes out a case entitling him to an accounting, not by reason of any partnership, for that could only be created as between the parties themselves by an agreement or understanding to that effect (and that we conclude is not sufficiently shown here), but by reason of their relations as tenants in common, and the necessity of an accounting before relief can be granted. . . .

The judgment dismissing the bill is reversed, with leave granted to plaintiff to amend, should he choose to do so; and the Court below will decree an accounting of all matters touching the Marysville mill; and should the bill be amended, also of the second Crown Point stock transaction.

It is so ordered.

WHITMAN, J., did not participate in the foregoing decision.

Wentworth's Lindley, Book I, chap. II; Dale *v.* Hamilton, 5 Hare, 393; Alabama Fertilizing Co. *v.* Reynolds, 79 Ala. 497; Frothingham *v.* Seymour, 118 Mass. 489.

OBJECT.

THE QUEEN *v.* ROBSON.

Crown Case reserved, 1885.

16 Q. B. D. 137.

CASE reserved by HAWKINS, J., of which the facts were as follows:

The prisoner was tried and convicted at the autumn assizes for the County of Northumberland on the 31st of October, 1885, on an indictment framed under 31 & 32 Vict. c. 116, s. 1, charging that he, being a member of a copartnership called the Bedlington Colliery Young Men's Christian Association (hereafter called the association), feloniously did in January, March, and May, 1885, embezzle three several sums of money of and belonging to the said copartnership.

The only question reserved for the consideration of the Court was whether the association was a copartnership within the meaning of the section above referred to. If it were, every other matter necessary to warrant the conviction was to be taken to be established by the verdict of the jury.

The object of the association was, to use the language of one of its printed rules, "the extension of the Kingdom of the Lord Jesus Christ among young men and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed twenty. Any person was eligible for membership "who gave decided evidence of his conversion to God," but, before he could become a member, he must be proposed and

seconded by two members of the association and elected by the committee on their being satisfied as to his suitability. Trustees for the time being in whom the real property belonging to the association was vested became members by virtue of their appointment as trustees. Members were required to subscribe three shillings per annum. It was not material to consider the qualification or status of associates. The affairs of the association were in the hands of a general committee of management, consisting of a president, two vice-presidents, a treasurer, two secretaries, and at least nine members. The committee had power to suspend or expel any member whose conduct was found inconsistent in their judgment with the Christian character. The agencies for the attainment of the objects of the association were, 1st, the personal efforts of the members; 2d, devotional meetings; 3d, social meetings; 4th, classes for Biblical instruction; 5th, the delivering of addresses and lectures; and, 6th, the diffusion of Christian and other suitable literature.

Before the first of the offenses charged against the prisoner was committed the members of the association proposed to build and afterward built a hall or place of meeting for the purposes of the association at a cost of nearly £200, of which about £40 was still owing. To this building every member had the right of entry and was entitled to a latch-key.

The prisoner became a member of the association in 1878, and had continued to be a member up to the time of the trial. As and being such member he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association, toward the building fund, and toward the liquidation of the aforesaid debt of £40. Three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association was a copartnership within the meaning of 31 & 32 Vict. c. 116, s. 1, the conviction was to stand affirmed. If on the contrary it was not the conviction was to be reversed.

Walton, for the prisoner. The only question is whether this association is a copartnership. The terms of the statute clearly show that the copartnerships contemplated thereby are copartnerships in the ordinary sense of the term, viz., for the purposes of gain or profit. LINDLEY, L. J., in his work on Partnership, p. 1, gives an explanation of the term "partnership," which shows that the necessary idea of a partnership is that it should have for its object the acquisition and division of gain. He says: "Without attempting to define the terms 'partners' and 'partnership,' it will suffice to point out as accurately as possible the leading ideas involved in these words. The terms in question are evidently derived from *to part* in the sense of to divide amongst or share; and this at once limits their application, although not very precisely: for persons may share almost anything imaginable, and may do so either by agreement or otherwise. But, in order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit; . . . . to use the word 'partnership' to denote a society not formed for gain is to destroy the value of the word, and can only lead to confusion. Nor is it consistent with modern usage. Lord HALE and older writers use copartnership in the sense of co-ownership, but this is no longer customary, and, as will be shown hereafter, there are many important differences between the two."

This is not an association for the purposes of profit or gain.

[Lord COLERIDGE, C. J. The only point reserved is whether this is a copartnership. The prisoner was not indicted as one of several joint beneficial owners.]

No counsel appeared for the prosecution.

Lord COLERIDGE, C. J. It seems to me that this conviction cannot be supported. I cannot find any authority throwing any doubt on the accuracy of the passage in Lindley on Part-

nership, which makes the participation in profits essential to the English idea of partnership, and states that, although in former times the word "copartnership" was used in the sense of "co-ownership," the modern usage has been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a copartnership in any sense of the word into which the notion of co-operation for the purpose of gain enters. We must construe the word "copartnership" as used in the Act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a copartnership within the Act. Inasmuch as we are of opinion that it is not, the conviction must be reversed.

Denman, J. I am of the same opinion. The word "copartnership" in the Act must be construed according to the well-known legal meaning of the term. If the section had only mentioned the case of a copartnership I should have thought it impossible to say that this case was within the statute. The conclusion to which we come is, in my opinion, much strengthened by the fact that the section contains another expression which covers the case of co-ownership where there is no copartnership. Here we are dealing only with the term "copartnership," for the only question reserved is whether this association was a copartnership within the section. I am clearly of opinion that it was not.

Field, Hawkins, and Wills, JJ., concurred.

Conviction reversed.

Wentworth's Lindley, 1, 2; Austin *v.* Thompson, 45 N. H. 113.

2. NOT CREATED BY OPERATION OF LAW.

PHILLIPS *v.* PHILLIPS.

Supreme Court of Illinois, 1863.

49 Ill. 437.

MR. CHIEF JUSTICE CATON delivered the opinion of the Court:

The only question in this case is one of fact. Was there a copartnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy had arisen? It must be remembered in the outset, that this is a controversy *inter sese*, and is not between third parties and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties to a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone, cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a copartnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

Over twenty years ago John Phillips emigrated from Scotland and settled in Chicago with his family, consisting of a wife and four sons and two daughters. He was then very poor. He was a wood-turner by trade, and commenced that business in a very small way with a foot-lathe. He was frugal, industrious, and honest, and prospered as but few men, even in this country, prosper. He labored hard with his own

hands, and as his sons grew up they joined their work to his, all except John S., who, at a proper age, was put as an apprentice to learn the chair-maker's trade, but his health proving delicate, his father made an arrangement with his master by which his time was released when he had but partially learned his trade, when John S. returned home and took a more or less active part in the business of his father. His health was, however, for many years, very delicate, and he was enabled to do but little physical labor. He, however, mostly took charge of the office and books, for which the testimony shows he was very well qualified, and where he rendered efficient service. In the meantime, the business had grown from the smallest beginning, with a single foot-lathe, to a large manufactory, with extensive machinery propelled by steam; and chair-making, which was introduced at an early day, had become the principal or largest branch of the business. Thus this business was begun and continued and prospered, till 1860, when the complainant left his father and the business, and filed this bill for an account as among partners.

The business had always been conducted as it was begun, in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips & Sons by persons with but a superficial acquaintance with them, which were paid without eliciting remark or particular attention. The books were all kept in the name of John Phillips, with the exception of a few entries made by a book-keeper in the name of John Phillips & Sons. Indeed, there is, and can be, no question that if there was a copartnership embracing the father and sons, the firm name adopted was John Phillips.

The complainant, to show a copartnership, proves that the sons all devoted their time and attention to the business after they attained their majority, without regular salaries as laborers or servants; that funds which they drew from the concern for their support were charged to each one separately, while neither ever received a credit for labor or services; that the father, upon one or two occasions, stated to third persons that his sons were interested in the business, and he also relies

upon the appearances to the outside public, and the interest which all took in the success of the business.

For the defense, it is claimed, that, following the habits and customs of their forefathers in Scotland, the sons continued to serve the father in the same relation and with the same fidelity after attaining their majority as before, under the distinct and often declared understanding that all should belong to the father during his life, and at his death the business and property should be left by him to his children, as he should think proper.

That this patriarchal system prevails to a much greater extent in Scotland than is familiar to us here is shown by the proof. This absolute control of the father over the property which is the fruit of the joint labor of the whole family, tends, undoubtedly, to accomplish one purpose, which was a cherished object with the father, and we may well believe was considered desirable by all, and that was, to keep the family together, and make all submissive and obedient to the father, as the head and owner, to whose discretion and will each must look for his proportion.

If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubtedly, the entire concern belonged to the father; and it so continued, unless by the agreement of the father the sons were admitted into the concern as partners; for, as before intimated, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent. Did the father ever consent that his sons, or either of them, should be admitted as partners with him? Did he ever agree that they should be part owners of this property? On repeated occasions the subject of a copartnership with his sons was presented to him, both in the presence of the complainant and his brothers, and he ever repudiated the suggestion in the most emphatic terms. The very suggestion, even, seemed to excite his indignation. Upon one occasion he expressed himself in this characteristic phrase: "Na, na! I will ha' nae sons for partners as long as I live.

Damn them! they would put me out of the door." On none of these occasions do we find the complainant, or any of his brothers, claiming the existence of a copartnership, but, on the contrary, they silently acquiesced in the assertions of the father.

But, to our minds, the controlling features of the evidence in this case consist in the testimony of the complainant himself, and his brothers. The testimony of Alexander A. C. Phillips, Kidzie and Peterson, shows that the complainant was repeatedly examined as a witness in cases between John Phillips and other parties, growing out of the business of the concern, and in all of these cases he swore that he was not a partner and had no interest in the concern. He then gave the same account of the relations between the father and sons which his brothers now give. Had there been a partnership he must have known it. If he had an interest in the business, he was then aware of it, and his denial of such partnership and interest must have been willfully false. There is no middle ground upon which he can stand in innocency, if there was a partnership. All his brothers, whom the complainant alleges in this bill were members of the firm, deny that there is, or ever has been, any copartnership in this business, but that the father is the sole proprietor, and that none of the sons have any interest in the business other than an expectancy upon the death of the father. This expectancy is neither a legal nor an equitable interest, and yet it powerfully allies the expectants, in feeling, sympathy, and effort, to the party or business from which they hope to realize their expectations. It often stimulates to long years of the most devoted service, as faithful and zealous as the most remunerative present reward.

That the complainant told the truth when thus examined, is testified to, as before stated, by all three of his brothers, in this cause, when they all stated that there was no such partnership as is alleged in the bill; that the entire business belonged solely to their father, in whose service they labored after they became of age the same as before, and that they had no inter-

est in the business except what they might expect after his decease, and that entirely depended on his pleasure. They spoke what they must certainly have known. Had there ever been any agreement, expressed or implied, that there should be a partnership, they, as parties to it, must have been aware of it. If not expressed in words, there must have been at least the mental intention and tacit understanding on the part of the father that they should be admitted as partners, and on their part to assume the benefits and liabilities of partners, and this could not be without their knowledge. Others might be deceived by appearances. Others, ignorant of the customs and traditions of their forefathers, which are so fondly cherished by emigrants from the old country, and particularly from Scotland, might draw erroneous conclusions as to the true relation existing between them as a family, by seeing men in middle life zealously bending their energies under the guidance of their father to the promotion of the success of the business. Whoever should apply customs prevalent among native Americans to this state of facts would unhesitatingly conclude that all were in partnership. And so, no doubt, many were deceived, nor was it deemed necessary by any of the parties, on all occasions, to undeceive them by a full explanation of this family arrangement.

But the question here is, what was the actual fact, and not what observers supposed was the fact from appearances. It is the internal truth we are seeking, and these external appearances are only important as they may enable us to arrive at this truth; and when we so find the truth by indubitable proof in a different direction than that indicated by these external appearances, then these must go for naught. Here we have the positive testimony of every living man who has the absolute knowledge of the facts, including the complainant himself, all testifying most unqualifiedly that there was no partnership. And all these witnesses stand unimpeached, either directly or indirectly. True, in the appellee's argument, they are denounced in the most unmeasured terms. We, however, believe the witnesses, and we also believe that the

complainant told the truth when he swore there was no partnership, and believing this, the case is ended. If he did tell the truth, if his brothers have not committed corrupt perjury with him, then this decree was wrong, for there was no partnership. The law does not authorize us to discard this positive testimony unless we can show, from the record, sufficient reason for it. This we cannot do.

In the appellee's argument, filed *nunc pro tunc*, great complaint is made of the insufficiency and unfairness of the abstract, and had the appellee filed an amended abstract under the rule, setting forth fully the omitted portion of the record deemed important, it would have relieved us of much of the labor of this cause. The volume of testimony in the case is immense, to the great mass of which we cannot even allude in an opinion, but must content ourselves with stating our conclusions, barely alluding to some of the most vital of the proofs.

The decree is reversed and the bill dismissed.

Decree reversed.

Farr *v.* Wheeler, 20 N. H. 569; Estate of Winters, 1 Myrick (Cal.) Pro. Rep. 131; Wilson *v.* Cobb, 28 N. J. Eq. 177.

Ward *v.* Brigham et al.

Supreme Court of Massachusetts, 1879.

127 Mass. 24.

Soule, J. It appears from the report of the master that, in the year 1869, the plaintiffs and six of the fifty defendants took preliminary steps towards the formation of a corporation under the St. of 1866, c. 290. Articles of association were signed, the amount of the capital stock was fixed at $10,000, and the par value of the shares was to be $25. The name of the corporation was to be The Westboro Milk Producers' Association, and its business was to be carried on at Westboro and at Boston. A first meeting was duly called and held, at

which by-laws were adopted, and a president, board of directors, auditing committee, and secretary and treasurer were chosen. The by-laws provide, among other things, that the directors, by vote of the stockholders, might borrow money and give notes and mortgages in the corporate name, and that the president and secretary should sign the same. The plaintiff Belknap was elected president, and the plaintiff Ward was elected a director. Eighteen of the defendants subscribed for stock, and certificates were issued to them according to their several subscriptions, amounting in all to twenty-nine shares, of the par value of $725. The plaintiff Belknap agreed to take, and a certificate was issued to him for, ten shares. The plaintiff Ward took a certificate for two shares. At adjourned meetings votes were passed authorizing the purchase of real estate, and authorizing the directors to borrow $3,000, and mortgage the real estate as security for the same. One subsequent meeting of the stockholders was held, or more, and one or more meetings of the directors, and divers votes were passed, the details of which are unimportant, in considering the questions presented by the case. The association failed to become a corporation, because the requirements of the statute were not complied with. The plaintiffs, however, with E. D. White, Jr., and H. W. Weld, two of the defendants, took possession of the real estate, on which was a cheese factory, and carried on the business of buying milk from the defendants, sending it to Boston for sale, so far as they found a market for it there, and manufacturing the surplus into butter and cheese, which products they sold in market. This was the business which it was intended that the corporation should do. After about a year, Weld ceased to participate in the management, but the plaintiffs and White continued to carry it on until May 1, 1873. The stock of the corporation was never taken up to any considerable extent, and in December, 1870, it being known that the association was not legally organized as a corporation, an attempt was made to organize a co-operative association under the St. of 1870, c. 224, but the business was never transferred thereto. The defendants were all in the

habit of selling milk to the association, and received payment therefor monthly by checks on a bank in Westboro, signed, "Lyman Belknap, Treasurer," and drawn on blanks on the margin of which the words "Westboro Milk Producers' Association" were printed. Money was raised by the plaintiffs, and by White and Weld, defendants, in the year 1869, on their own notes, and by them put into the business, and afterward, on other of their notes, money was borrowed by them and put into the business. Those of the defendants who did not subscribe for stock in the association had no relations with it other than as sellers of milk. The other defendants were aware that the plaintiffs had advanced their own money for conducting the business. The plaintiffs acted in good faith, and regarded themselves as agents for the association, with the intention of turning the business over to it whenever it should become a legally established corporation. The defendants gave no authority to the plaintiffs to act as their agents, unless such authority is to be inferred from the foregoing facts; and never intended to become partners with the plaintiffs, nor to have any other relation to the business than as sellers of milk, except that the eighteen subscribers to the stock of the association expected to be holders of stock in the corporation when it should be legally established. The main purpose of establishing the proposed corporation was to provide a constant market for the milk at remunerative prices to the producers; it not being expected or intended that the corporation should make any important profits from its business. When the business was closed in the year 1873, and its debts were paid by the plaintiffs, except one month's dues to the defendants for milk, which were never paid, the plaintiffs had paid out about $11,700 more than they had received.

There is no foundation in the facts found by the master for the claim that those of the defendants, who did not sign the articles of association, and did not subscribe for stock in the association, were partners of the plaintiffs. They were merely dealers with the plaintiffs, selling merchandise and receiving payment therefor, at stated times and on terms agreed upon;

and, whether the plaintiffs were principals or agents in the matter, those defendants had no part in setting them up in the business, nor in creating the agency. They dealt with the plaintiffs as with any other purchaser, and the fact that the method in which the plaintiffs managed the business and dealt with them gave them substantially the same advantages which the establishment of the proposed corporation was intended to give its stockholders was a mere incident which did not impose on them any new obligations or liabilities. As to those defendants, therefore, the plaintiffs have made no case.

As to the defendants who signed the articles of association, and who subscribed for stock, no partnership with the plaintiffs is established by the facts found, because no such relation was contemplated by any of the parties. On the contrary, it appears that the plaintiffs did what they did for and in behalf of the proposed corporation, as its agents, and with the intention to give the business into its hands whenever it should be legally qualified to take it. In this state of facts, the subscribers to the stock or articles of association are not partners with those who assume the risk of acting for a corporation not yet legally established. They participated in the attempt to form a corporation, for the purpose of avoiding that personal liability for debts which attaches to membership of a copartnership. Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction. Their mistake, though shared by the defendant subscribers to the stock, does not make those subscribers partners in the business done: Fay *v.* Noble, 7 Cush. 188; Trowbridge *v.* Scudder, 11 Cush. 83; First National Bank *v.* Almy, 117 Mass. 476.

Bill dismissed, with costs.

TO THE SAME POINT.

FINNEGAN *v.* KNIGHTS OF LABOR BUILDING ASSOCIATION.
Supreme Court of Minnesota, 1893.
53 N. W. Rep. 1150.

GILFILLAN, C. J. Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, c. 29, a corporation, for the purpose, as specified in them, of "buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the 'Knights of Labor.'" The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to $599.50, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the "K. of L. Building Association." The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because—*First*, the Act under which it attempted to become incorporated, to wit, Laws 1870, c. 29, is void, because its subject is not properly expressed in the title; *second*, the Act does not authorize the formation of corporations for the purpose or to transact the business stated in the articles; *third*, the place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of *quo warranto*, in behalf of the State; for, although an association may not be able to justify itself when called on by the State to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation, that, for reasons of public policy, no one but the State will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by SELDEN, J., in Methodist, etc., Church *v.* Pickett, 19 N. Y. 482, as "(1) the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this Court in East Norway Church *v.* Froislie, 37 Minn. 447, 35 N. W. Rep. 260; but, as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations (page 145) is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling Act, their authority to act as a corporation cannot be questioned collaterally." To give to a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the *status* of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the *status* of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in Johnson *v.* Corser, 34 Minn. 355, 25 N. W. Rep. 799, in which it was held that what had been done was ineffectual to limit the

individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required. "Color of apparent organization under some charter or enabling Act" does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure;* but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

The title to chapter 29 is "An Act in relation to the formation of co-operative associations." Appellant's counsel argues that the body of the Act does not contain a single element of "co-operation," as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all the members, either by their labor or capital, or both, co-operate to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular, signification. In the Century Dictionary the term "co-operative society" is defined, "A union of individuals; commonly laborers or small capitalists, formed . . . for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local, but the capital stock is limited to $50,000, the stock which one member may hold to $1,000. No one can become a shareholder without the con-

sent of the managers, and no one is entitled to more than one vote. The provisions in the body of the Act are in accord with the title, and it is therefore not open to the objection made against it. The purposes for which, under the Act, corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." The main purpose of the Act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving a reasonably liberal meaning to the word "trade" in the Act, it would include the buying and selling of real estate, and, upon a similar construction, the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the Act authorizes the corporation to "take, hold, and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing. The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*. The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

Trowbridge *v.* Scudder, 11 Cush. 83; Fay *v.* Noble, 7 Cush. 188; Central City Sav. Bank *v.* Walker, 66 N. Y. 424.

THE CONTRARY OPINION.

BIGELOW *v.* GREGORY ET AL.

Supreme Court of Illinois, 1874.

73 Ill. 197.

APPEAL from the Circuit Court of Cook County; the Hon. LAMBERT TREE, Judge, presiding.

This was an action of assumpsit, brought by Bigelow, appellant, against Charles A. Gregory, Franklin H. Watriss, Oramel S. Hough, and Reuben Hatch, as copartners, doing business under the name and style of the Warfield Cold Water Soap Company, to recover for goods sold and delivered. The defendants in the Court below pleaded the general issue, and also interposed a further plea denying the partnership, verifying the same by affidavit. The cause was tried by the Court without a jury, and the issues found and judgment rendered for the defendants. The plaintiff brings the record here by appeal to reverse the judgment.

From the testimony, it appears that, in November, 1870, the defendants, with one Isaac N. Gregory, signed a certain paper, commencing:

"Articles of association of Warfield's Cold Water Soap Company of Milwaukee.

"We, the undersigned, being desirous of forming a company for the purpose of carrying on a manufacturing business, as hereinafter stated, under authority of the Act of the Legislature of the State of Wisconsin, relating to joint stock companies, approved April 2, 1858, and Acts amendatory thereof, do hereby agree and certify that the name of the company is and shall be, Warfield's Cold Water Soap Company, of Milwaukee," proceeding to state at length the objects of the company, the amount of its capital stock, its number of shares, the terms of existence of the company, the number and names of the directors for the first year, they being the subscribers themselves, how the capital stock should be paid, the signers subscribing

for all the stock, and agreeing to pay it as required by the directors, and concluding:

"We hereby adopt the foregoing as the articles of association of said Warfield's Cold Water Soap Company, of Milwaukee, for the purpose of becoming a body politic and corporate under said name.

"Witness our hands, at Chicago, Illinois, this twenty-third day of November, A. D. 1870.

"CHARLES A. GREGORY,
"FRANKLIN H. WATRISS,
"ORAMEL S. HOUGH,
"REUBEN HATCH,
"ISAAC N. GREGORY."

This paper was filed in the office of the Secretary of State of Wisconsin, on the 8th day of July, 1871, and in the office of the City Clerk of Milwaukee, August 23, 1871. It was also published in two newspapers in Milwaukee, the *Guide*, and *Herald*, September 13 and 15, 1871.

The Revised Statutes of Wisconsin were introduced in evidence, and the Act under which defendants claimed to have become incorporated.

Section 1 provides that corporations organized under this chapter shall have the usual privileges and powers of corporations.

Section 2. Any number of persons, not less than three, who, by articles of agreement in writing, shall associate according to the provisions of this law, . . . and who shall comply with the provisions of this chapter, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them.

Section 17. Before any corporation formed and established by virtue of the provisions of law, shall commence business, the president and directors shall cause their articles of association to be published at full length in two newspapers, etc. They shall also make a certificate of the purpose for which such corporation is formed, the amount of their capital stock,

the amount actually paid in, and the names of their shareholders and the number of shares of each respectively owned, which certificate shall be signed by the president and a majority of the directors, and deposited with the Secretary of State, and a duplicate thereof with the town clerk of the town or clerk of the village or city where the business is to be transacted, which is to be recorded in books kept for the purpose.

Business was done under the name of the company, in which the defendants were jointly interested. There is no controversy as to the sale and delivery of the goods.

Mr. Justice SHELDON delivered the opinion of the Court:

The only question here arising is, whether the defendants were exempt from individual liability by reason of having become a corporation.

The second section of the Act of Wisconsin, under which defendants claim to have become incorporated, provides that, the persons who, by articles of agreement in writing, should associate according to the provisions of that law, and who should comply with the provisions of that chapter, should become a body politic and corporate, etc. Not that they should so become by articles of agreement in writing, but the further thing was required, of a compliance with the provisions of that chapter.

Section 17 is express, that before any corporation formed and established by virtue of the provisions of law, shall commence business, the articles of association should be published in two newspapers in the county in which the corporation was located, and the certificate required should be deposited with the Secretary of State, and a duplicate with the clerk of the town or city where the corporation was to transact its business.

We are of opinion that in this case, as the question here comes up, the right of the defendants to be considered a corporation, depends upon their having complied with the requirements of the statute, at least to the extent of the publi-

cation of their articles of association, and the filing of the certificate. These are important acts as effects the public interest, as affording means of notice respecting the corporation to such as deal with it, so that they may regulate their action and give or withhold credit accordingly, and we think they are to be regarded as statutory prerequisites, essential to corporate existence.

The defendants are seeking escape from individual liability; let them show that they have complied with the statute which enables them to do so, at least substantially, as respects the above-named acts. Such we regard to be the doctrine of the authorities: Union Insurance Co. *v.* Cram, 43 N. H. 641; Mokelmune Mining Co. *v.* Woodbury, 14 Cal. 425; Harris *v.* McGregor, 29 Ib. 124; Spencer Field *v.* Paul Cooks, 16 Louisiana An. R. 153; Angell & Ames on Corp., § 83.

Various cases decided by this Court have been cited by appellees' counsel, containing general expressions to the effect that an organization in fact and user under it are sufficient to show a corporation *de facto*, although there might have been irregularities or omissions, and that these could not be urged collaterally against the existence of the corporation, but only in a direct proceeding by *scire facias*, or by information in the nature of a *quo warranto*. But these cases, we conceive, have but an imperfect application here. Some of them were cases where special charters had been granted, and almost all were cases between the company and its stockholders. There is a manifest difference where a corporation is created by a special charter and there have been acts of user, and where individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case, it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. And there would seem to be a distinction between the case where, in a suit between a corporation and a stockholder or other individual, the plea of *nul tiel corporation* is set up to defeat a liability which the one may have contracted with the other, and the case of a suit against individuals who claim exemption from individual

liability, on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case, a stricter measure of compliance with statutory requirements will be required than in the former.

The most pertinent of these cases referred to in this Court are Cross *v.* Pinckneyville Mill Co., 17 Ill. 54, and subsequent cases following it, where it was held, that, under the Act of 1849, p. 87, the filing of the duplicate certificate of organization in the office of the Secretary of State, required by the first section of that Act, was but directory, and the omission to so file it did not defeat the organization. But it was put upon the ground that, as the first section required the certificate to be filed in the office of the clerk of the county in which the business of the company was to be carried on, the filing of the duplicate in the office of the Secretary of State was regarded as a secondary object; and that that view was confirmed by the language of the second section, in declaring that "when *the certificate* shall have been filed as aforesaid," the persons signing, and their successors, "shall be a body politic and corporate in fact and in name." And it was there said: Whatever is expressly or impliedly required to be done as essential to bring the corporation into existence, must be done.

This Court has never held that individuals could make themselves a corporation by the mere signing of articles of agreement. And in the language of Parsons on Partnership, p. 544, "we do not believe that a joint stock company, or any other partnership, can limit its own liabilities and become a corporation or limited partnership by its own act and without any regard to the formalities or requirements of the law;" and see Stowe *v.* Flagg *et al.*, 72 Ill. 397.

The account sued on commenced March 2, 1871, and ended August 19, 1871.

Nothing had been done toward incorporation, except the signing of the articles of association, until July 8, 1871, when the articles were filed with the Secretary of State of Wisconsin. They may be regarded, perhaps, as substantially embracing the particulars required in the certificate. The greater

portion of the indebtedness sued for had been contracted prior to that time.

The filing of the articles in the office of the city clerk of Milwaukee, in which place the business of the corporation was to be transacted, and the publication in the newspapers, did not take place until after August 19, 1871, when the whole indebtedness had been contracted.

We are of opinion the defendants were liable as partners, and had not absolved themselves from responsibility as such by having become a corporation.

The judgment will be reversed.

Judgment reversed.

Wentworth's Lindley, 5; Jessup *v.* Carnegie, 80 N. Y. 441; Coleman *v.* Coleman, 78 Ind. 344; Holbrook *v.* St. Paul Fire and Marine Ins. Co., 25 Minn. 229; Hurt *v.* Salisbury, 55 Mo. 310.

3. BY ESTOPPEL.

Poole *v.* Fisher.

Supreme Court of Illinois, 1871.

62 Ill. 181.

Mr. Justice Thornton delivered the opinion of the Court:

This suit was brought against appellees, as partners, for goods sold and delivered.

They denied the partnership by proper pleas, verified by affidavit.

The judgment was rendered against Fisher for the debt, and in favor of Miller for costs.

The claim is not disputed; and the only question is, was Miller liable, as partner, for the debt incurred?

Fisher—a man without means or credit—commenced business in Chicago, and purchased goods of appellants, merchants in New York. The firm name was A. D. Fisher & Co.

The reporter of the mercantile agency in Chicago had an interview with Miller as to the parties who comprised the firm

of Fisher & Co. Miller informed him that his father and himself were general partners of Fisher. Upon this information a report was sent to New York that the firm was responsible, so long as Miller & Son were connected with it.

Poole testified that Fisher said to him, when he purchased goods, that Miller was his partner, and the moneyed man of the firm; that afterward he saw Miller in the store in Chicago; was introduced to him as the partner of Fisher; conversed with him as partner; supposed him to be so; sold the goods under that belief; and met Miller at the Sherman House afterward; and he assured the witness that the claim would be paid.

McKean testified that both Fisher and Miller told him that Miller was one of the firm; that he was introduced to Miller as the partner of Fisher; and the former admitted that he was a full partner.

Fisk testified that he first met Miller and Fisher in the fall of 1867; that Fisher spoke of Miller as his particular friend and partner; that Miller remarked that he took no active part in the business, but allowed Fisher to manage it; that afterward Miller spoke to him about a bill due by the firm, and said it must be paid.

Kelley, a clerk for the firm, testified he had a conversation with Miller, before the store was opened, and he said if the business proved successful, "we will go in on a large scale;" that he would be satisfied if the store paid his spending money; that on one occasion Miller said to him, "do the best you can for us, and we will do well by you;" that he made inquiries about the business; and that he frequently heard Fisher introduce Miller as his partner, without any denial on the part of Miller.

This proof, if it does not show an actual partnership between the parties, is pretty conclusive that one existed as to third persons.

The testimony in defense is very slight.

Fisher made a positive denial of the partnership, and of all his acts and language indicating this relation. He is, how-

ever, so flatly contradicted by so many persons that we cannot attach much weight to his evidence.

Miller denied the partnership in fact; but he does not negative the numerous acts and remarks proved which necessarily induced third parties to believe that he was a partner. His reply generally was, "I don't remember." This was manifest evasion; for it would be passing strange if he could not recollect the interviews with Poole, and McKean, and Fisk.

The testimony of the father has no weight in the scale. He said that his son was not a partner. How could he know the exact relation between the parties? He said, however, that he loaned $10,000 to Fisher, and that his son and Fisher spoke to him about furnishing the money.

No reason is assigned for this generosity on the part of the father; no guide afforded to explain this exceeding interest on the part of the son.

We shall not inquire whether there was an actual partnership or not.

The acts and language of Miller most clearly induced appellants to give credit to the firm. The credit was given upon his responsibility. These creditors evidently believed him to be a partner, and acted upon such belief. The belief was honest, and fully justified by the conduct of Miller.

The law will therefore hold him liable, upon principles of general policy, and for the prevention of frauds upon creditors.

The conduct, as well as representations, of Miller to one of appellants, are sufficient to charge him as partner. He held himself out as such, and cannot escape the consequences: Story on Part., § 64; Fisher *v.* Bowles, 20 Ill. 396; Niehoff *v.* Dudley, 40 Ill. 406.

The testimony is so overwhelming in favor of appellants that we are constrained to reverse the judgment and remand the cause.

Judgment reversed.

Wentworth's Lindley, 40 *et seq.*; Shafer *v.* Randolph, 99 Pa. St. 250; French *v.* Barron, 49 Vt. 471; Sherrod *v.* Langdon, 21 Ia. 518; Martyn *v.* Gray, 14 C. B. (N. S.), 108 Eng. Com. Law, 824; Sun Ins. Co. *v.* Kountz Line, 122 U. S. 583; Brown *v.* Pickard, 9 Pac. Rep. 573.

4. THE TEST; INTENTION.

a. Not Formerly Recognized.

GRACE *v.* SMITH.

King's Bench, Easter Term, 1775.

2 Wm. Bl. 998.

ASSUMPSIT for goods sold and delivered. On trial at the Sittings after last Term, verdict for the defendant; and now Davy moved for a new trial, the verdict, as he said, being contrary to law and evidence.

DE GREY, C. J., reported that this was an action brought against Smith alone as a secret partner with one Robinson (*vide* Abbot and Smith, *ante*, p. 947), tc whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of March, 1767, Smith and Robinson entered into partnership for seven years, but in the November afterward, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. That Smith was to have back £4,200 which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,000, part of this £5,200, or let it remain in his hands for seven years at five per cent. interest. and an annuity of £300 per annum, for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest, and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. That

on the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one, viz., £5,200 due to him on the dissolution of the partnership, £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship; in all £7,000, for which Robinson gave a bond to Smith. That on the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

Davy, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership, or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it twelve and a half per cent. profit, which could not be fairly done unless it be understood to arise from the profits of the trade; and that he ought therefore to be considered as a secret partner. And he relied much on a case of Bloxham & Fourdrinier against Pell & Brooke, tried at the same Sittings (7th of March, 1775) before Lord MANSFIELD in the King's Bench, as in point. "This was also a partnership for seven years between Brooke and Pell; but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited, that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at five per cent., which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord MANSFIELD held that Pell was a secret partner. This was a device to make more

than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say, 'It is usury, and not a partnership.'"

Grose and *Adair*, for the defendant, argued that the present case is very distinguishable from that of Bloxham and Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given, as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma, that it must be either usury or partnership. It may be, and probably was, a premium for the good-will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial that it appears to have been rated at £1,000 to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or by seven instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership is a question proper for a jury, who have here decided it on a consideration of all the circumstances.

De Grey, C. J. The only question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo* or *left behind* in trade by one of the partners who retires. And whether the

terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said that this is not payable out of the profits, and I think there is no foundation for granting a new trial.

GOULD, J., same opinion.

BLACKSTONE, J., same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not is not material to the present question), in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount.

NARES, J., same opinion.

Rule discharged.

Cheap *v.* Gramond, 4 B. & Ald. 663, 6 Eng. Com. Law; Waugh *v.* Carver, 2 H. Bl. 235; Smith's Lead. C., 9th Amer. ed. 1178.

b. Now Recognized.

SAILORS *v.* NIXON-JONES CO.

Appellate Court of Illinois, 1886.

20 Ill. Appellate Rep. 509.

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding. Opinion filed January 26, 1887.

An action was brought by appellee against appellant, im-

pleaded with Jules T. Guibout and Tryon J. Woodward. The issue tried was upon a plea by appellant denying joint liability. It appeared that in the spring of 1884, appellant being the owner of a system of commercial reporting and rating, in part consisting of certain books or forms which had been copyrighted by him, sold a one-third interest to one Black, and another third to Woodward. The business, which was called the Merchants' Mutual Protection and Collection Association, was located at St. Louis, and appellant living in Chicago, Black and Woodward were to conduct the business. In June or July, 1884, appellant sold his third interest to one Nixon, and after the business had been conducted awhile by Woodward, Nixon, and Black, Black left the concern, and having failed to pay appellant in full for the third purchased by him, that third interest reverted under the contract of purchase to appellant. After a time Nixon sold his interest to one Guibout, and about January 1, 1885, Woodward being the owner of one-third of the copyright books and the business in St. Louis, Guibout the owner of another one-third, and appellant of the other third, the following contract in writing was made between them:

"This article of agreement, made and entered into, in duplicate, this 2d day of January, 1885, by and between Henry C. Sailors, of Chicago, Illinois, and Jules T. Guibout and Tryon J. Woodward, of St. Louis, Missouri, in consideration of the mutual covenants herein named, witnesseth: that whereas, by mutual terms this day agreed upon by the parties hereto, said Jules T. Guibout has become possessed of an undivided one-third interest in and to the business heretofore carried on at St. Louis, under the firm name of Woodward & Co., managers of the Merchants' Mutual Protection and Collection Association of that city, now it is expressly and further agreed by the parties hereto:

"Item one. That said business shall be conducted and carried on as before by the parties hereto, except that while the said Henry C. Sailors is hereby released from all active management or responsibility of said business for two years

from and after this date, said other partners are hereby declared and agreed to be the sole responsible managers for two years from this date; and they agree to use all diligence and skill required by said business, and to advance its interests and promote the same by their reasonable endeavor, and to share all profits and losses between them, the said two persons, during said two years. Said Henry C. Sailors shall have no pecuniary interest or liability therein, during said time, but shall have the right, from time to time, to a reasonable inspection of the current books and business of said firm, and to advance its interests in any reasonable manner, from time to time, and to ask and receive at proper times, from his said copartners, or either of them, such information as they may from time to time possess.

"At the expiration of said two years, said partnership shall continue, but the profits and losses thereafter shall be shared in proportion to the several interests of the parties hereto, and said Henry C. Sailors, by himself or representative, to be by him named and accepted by all parties, shall actively co-operate in the conduct, management, and promotion of the business thereof.

"Witness our hands and seals at Chicago, Illinois, the day and year first above written.

"H. C. SAILORS, [SEAL.]
"JULES T. GUIBOUT, [SEAL.]
"TRYON J. WOODWARD. [SEAL.]

"*Addendum:*

"By mutual agreement by and between the undersigned, and in consideration thereof, the partnership name of the within business and copartnership is this day changed to that of the 'Union Mercantile Agency.'

"Witness our hands and seals this the 6th day of April, 1885.

"Witness:

"HENRY C. SAILORS, [SEAL.]
"J. T. GUIBOUT, [SEAL.]
"T. J. WOODWARD. [SEAL.]"

In May, 1885, the indebtedness for which the action was brought was incurred on the order of Guibout, and was for printing certain books containing ratings which were to be distributed to customers with a view of increasing the profits of the business. No participation by appellant in the conduct or management of the business was shown, but in their depositions offered in behalf of appellee, both Woodward and Guibout say that appellant was a partner.

May 26, 1885, an agreement of sale of their interest was made by Guibout and Woodward, in the business, to one Clark, to which transfer appellant consented. The agreement of sale was as follows: "St. Louis, May 26, 1885. J. T. Guibout and T. J. Woodward: I propose to purchase your two-thirds interest in the business known as the Union Mercantile Agency (formerly the Merchants' Mutual Protection and Collection Association of the City of St. Louis, Mo.), including all books, blanks, office furniture, contracts, good-will of the business, office lease, insurance policies, and in fact, your entire interests and control in said business, for which I agree to pay you two thousand dollars. The bill of sale to be executed and immediate possession of office and all property named above given me upon payment of said money, which shall be on or before June 10, 1885. The amount shall be in full and any liabilities, if any there be, shall be fully paid and satisfied by you. Money to be paid, $1,000 to each. That is, $1,000 to said Guibout, and $1,000 to said Woodward.

"W. J. Clark.

"In consideration of one dollar to me in hand paid, we hereby accept the above proposition.

"Jules T. Guibout,
"Tryon J. Woodward.

"Witness: I hereby consent to said transfer of interests.
"H. C. Sailors."

The agreed sale was not consummated, and on June 26, 1885, a voluntary assignment was made at St. Louis by Wood-

ward and Guibout. In Guibout's deposition which was read at the trial by appellees, were the following questions and answers:

Q. "Did you inform the officers of this company (meaning plaintiffs) at the time this contract was made, as to who constituted your association?

A. "Yes, sir.

Q. "What was the information you gave them?

A. "Well, I informed Mr. Nixon, of Nixon-Jones Printing Co., that the firm consisted of Mr. Woodward, Mr. Henry C. Sailors, and myself."

After the appellee rested, appellant moved to strike out and take from the consideration of the jury the foregoing portion of the testimony of Guibout, but the Court overruled the motion, and the appellee excepted.

Guibout further testified that the books were printed with appellant's knowledge "and also with his understanding that he was going to help us pay for them. While those books were being printed, I went to Chicago and had a conversation with Mr. Sailors at his place of business, and I told him of our straitened circumstances, and he told me that that book would surely give us a boom and enable us to collect all that was due from subscribers and take many more, and he told me besides that he would certainly be able to help us in a little while."

Appellant in his testimony denied that he ever agreed to pay anything toward the books, or that he knew anything of them until they were printed.

There was a verdict against appellant, and judgment, and the case is brought to this Court by appeal.

MORAN, J. The contract of January 2, 1885, between Woodward and Guibout and appellant, did not constitute appellant a partner in the business which Woodward and Guibout were to conduct in St. Louis. True, the word "partnership" is used to designate the relation of the parties, but the whole agreement shows plainly that Sailors was a joint owner

merely, and that the business was to be conducted wholly by the others, and they were to have the entire profits accruing, and bear all losses that might happen in running the business, till, at the end of two years, Sailors was to come into a participation of the business, and thereafter share the profits and losses of the business that should be done. It was a contract which bound appellant to become a partner at the end of two years, but such contract would not make him liable for debts contracted before his relation as partner commenced. The agreement is very explicit that he shall not share the profits nor be liable for the losses. He retained only his one-third ownership in the books and good-will of the business, and had no control over its management and no right beyond seeing to the preservation of the property. The fact that the parties to such relation themselves call it a partnership will not make it so. Where the question of a partnership is to be determined from a contract between the parties to it, the relation must be found from the terms and provisions of the contract, and even though parties intend to become partners, yet if they so frame the terms and provisions of their contract as to leave them without any community of interest in the business or profits, they are not partners either in fact or in law: Parsons on Partnership, 91. A partnership *inter se* must result from the intention of the parties as expressed in the contract, and they cannot be made to assume toward each other a relation which they have expressly contracted not to assume. The terms of the agreement, where there is one, fixes the real status of the parties toward each other.

If there is no agreement, then if they deal with each other as partners, sharing losses and profits, their interest will be gathered from their acts, and they will be partners *inter se:* Collyer on Partnership, § 2 and note. A mere community of interest in property will not make the owners partners. There must be an agreement for a joint venture and to share profits and losses; and in the absence of such a mutual agreement they are mere tenants in common of the property and

the act of one will not bind the other: Chase *v.* Barrett, 4 Paige, 148; Niehoff *et al. v.* Dudley, 40 Ill. 406; Smith *v.* Knight, 71 Ill. 149.

As the contract did not make appellant a partner, he could only be held on the ground that he had held himself out as one, or authorized or assented to his being so held out. Nixon says that he knew appellant was a partner when the books were ordered, but he does not state how he knew it, and it may well be inferred that he only knew from what Guibout told him at the time the books were ordered. The question whether the appellant had been, with his consent, held out as a partner to the plaintiff, was one of fact for the jury; and it was important that in determining that question the jury should be confined to whatever competent testimony was before them. The statement in Guibout's deposition that he told Nixon that appellant was one of the firm without proof that appellant authorized the statement, was incompetent, and in view of all the evidence in the case was calculated to mislead the jury. A party has a right to insist that irrelevant and incompetent testimony shall be excluded. Incompetent testimony in a deposition, though not objected to when the deposition is taken, may be objected to on the trial. The objection is not as to mere form, it is substantial: Cooke *v.* Orne, 37 Ill. 186; Lockwood *v.* Mills, 39 Ill. 602.

Nor did appellant lose his right to have the evidence excluded by failing to object to it when read from the deposition. When incompetent testimony gets into the case in the shape of depositions or otherwise, it is the duty of the Court, when required, at any stage of the trial, to exclude it or direct the jury to disregard it: Pittman *v.* Gaty, 5 Gilm. 186; Greenup *v.* Stoker, 2 Gilm. 688; Wickenkamp *v.* Wickenkamp, 77 Ill. 92.

The refusal of the Court to exclude the evidence on appellant's motion was material error, and, while we are much inclined to the opinion that there was no legal evidence before the jury to support a verdict that appellant was jointly liable, still we prefer to rest the reversal on the error above specified,

and remand the case for such further action as the parties may desire to take.

Reversed and remanded.

Wentworth's Lindley, 10 N.; Rosenfield *v.* Haight, 53 Wis. 260; McDonald *v.* Matney, 82 Mo. 358; Hitchings *v.* Ellis, 12 Gray, 452; Manhattan Brass and Mfg. Co. *v.* Sears, 45 N. Y. 797; Pooley *v.* Driver, 5 Ch. D. 458; Dwinel *v.* Stone, 30 Me. 384.

c. Evidences of Intention.

(*a.*) Agency.

BEECHER *v.* BUSH.

Supreme Court of Michigan, 1881.

45 Mich. 188.

COOLEY, J. The purpose of the action in the Court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the Courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary:" KENT, C. J., in Post *v.* Kimberly, 9 Johns. 470, 504.

We have then a case in which the party it is sought to

charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case; the marks which force that construction upon the Court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the elaborate and able brief which has been presented in behalf of the defendants in error, it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits, and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in Hinman *v.* Littell, 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions: Eager *v.* Crawford, 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross

receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words: Loomis *v.* Marshall, 12 Conn. 69, 79.

In Cox *v.* Hickman, 8 H. L. Cas. 268, 306, Lord CRANWORTH stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf—*i. e.*, that he stood in the relation of principal toward the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common

mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

It is said, and we believe justly, in Bullen *v.* Sharp, L. R. 1 C. B. 86, that the decision in Cox *v.* Hickman brought back the law of England to what it should be, and Mr. Baron BRAMWELL, referring to what was declared to be law in Waugh *v.* Carver, 2 H. Bl. 235, 2 Smith's Lead. Cases, 9th Amer. ed. 1178, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books:" p. 128. It is certainly overruled very conclusively in Great Britain: Kilshaw *v.* Jukes, 3 B. & S. 847, 113 Eng. Com. Law; Shaw *v.* Gault, 16 Irish C. L. R. 357; Holme *v.* Hammond, L. R. 7 Exch. 218; *Ex parte* Delhasse, 7 Ch. Div. 511. And though in New York, the Courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in Cox *v.* Hickman to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed, that is very well shown in Eastman *v.* Clark, 53 N. H. 276, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which, in their facts, have a resemblance, more or less strong, to the one before us.

Champion *v.* Bostwick, 18 Wend. 175, was a case where parties who were severally owners of horses and stages on different parts of one stage line made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of Eastman *v.* Clark, 53 N. H. 276, the conclusion of partnership or no partnership,

it was said, must be drawn as one of fact. "The real and ultimate question," says SMITH, J. (p. 289), "in all cases like the present, is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation existed is a question of fact. . . . There is no sound foundation for an arbitrary rule of law requiring Courts or juries to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In Farmers' Ins. Co. *v.* Ross, 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and Musier *v.* Trumpbour, 5 Wend. 274, and Everitt *v.* Chapman, 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of Loomis *v.* Marshall, 12 Conn. 69, can hardly be considered in accord with it. The facts were these: B had a cloth factory. A agreed with him to furnish a full supply of wool for two years, B to devote the factory for two years exclusively to manufacturing, and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in the proportion of 55 per centum to A and 45 per centum to B, and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says HUNTINGTON, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it a partner must not only share in the profits, but share in them as a principal; for the rule is now well estab-

lished that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner." And of the share set off to B he says it "is not expressed in terms to be for such compensation; but this is its legal meaning:" pp. 77, 79. Moore *v.* Smith, 19 Ala. 774; Bowman *v.* Bailey, 10 Vt. 170, and Price *v.* Alexander, 2 Greene (Ia.), 427, may be referred to for similar views.

One of Chief Justice GIBSON's short but very lucid opinions is in point here. Between Bronson, a manufacturer, and Dunham, a country merchant, there was an agreement that the former should furnish wooden handles made to order to the latter, at a tariff of prices to be paid out of the store, on the proceeds of the handles; Bronson finding the labor and stuff, and receiving a further compensation for skill and the rent of the storehouse, in the form of a commission of fifty per centum on the net profits of the whole. It was sought to charge Dunham as a partner with Bronson for the price of raw material the latter had bought. Upon these facts it is said: "Now, it has been so often and so invariably ruled in England and America that a commission on profits is not such an interest in the concern as constitutes partnership that the point is at rest. What staggers the mind in this instance is the apparent shallowness of the distinction when it is considered that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and that, whatever be the proportion, the relation produced by a compensation in the form of a commission is in every instance the same. But by the terms of the contract Bronson and not Dunham was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision I admit would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming for the moment that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is

to be borne in mind that the handles, as well as the store goods, were to be put into the concern as separate contributions to the joint stock; and that, as the stuff for the handles was to be procured by Bronson it was consequently to be paid for by him, just as the store goods were to be procured and paid for by Dunham, having been purchased on separate account. There may be a partnership for selling and not for buying; or for buying and not for selling; or for both buying and selling, which is the most usual: as if several put separate quantities of wheat into a common stock to be ground into flour and sold on joint account; or agree to buy jointly and divide the article when bought; or agree to buy and sell on joint account. In the first case each would be liable for his own purchases only; but in the second and third cases, each would be liable for the whole. Now if there were any partnership in this instance it would be of the first class; and in any view of the case the defendant would not be liable:" Dunham *v.* Rogers, 1 Pa. St. 255, 262.

Not dissimilar to this is the case of Denny *v.* Cabot, 6 Met. 82, which was also a case in which one party supplied the raw material and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and services; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. Perrine *v.* Hankinson, 11 N. J. 181, is relied upon as authority, among other cases. The same doctrine was reiterated in Holmes *v.* Old Colony R. R. Co., 5 Gray, 58; Bradley *v.* White, 10 Met. 303; and by DAY, J., in a careful opinion in Harvey *v.* Childs, 28 Ohio St. 319, already referred to.

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective had been applied. Except when one allows the

public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short, what one act might he do or authority exercise which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a

business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and, therefore, have not deemed it necessary to exclude.

On the other hand, what single act are we warranted in inferring the parties understood Williams was to do for, and as the agent of, Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies, or overrule his judgments. He did, indeed, agree to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not

compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If, therefore, we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams's assent was required.

There is another view of this case that seems to us conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret

partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel, and we must suppose had his clerk there. These were facts open and patent to the whole world who had occasion to go there or to deal with Williams. They naturally suggested the inquiry what was the arrangement between the parties; and there is nothing in the case to indicate that plaintiff in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If, therefore, there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher. Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity, or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between them-

selves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

Wentworth's Lindley, 31 *et seq.*; Eastman *v.* Clark, 53 N. H. 276; Hart *v.* Kelley, 83 Pa. St. 286; Cox *v.* Hickman, 8 H. L. Cases, 268 (1860); Central City Sav. Bank *v.* Walker, 66 N. Y. 424; Meehan *v.* Valentine, 145 U. S. 611; Harvey *v.* Childs, 28 Ohio St. 319.

(*b.*) Participation in both Profit and Loss.

DURYEA *v.* WHITCOMB.

Supreme Court of Vermont, 1858.

31 Vt. 393.

BOOK ACCOUNT. The auditor reported that on the 20th of August, 1854, the defendant, the plaintiffs, and Isaac B. Lewis, made an agreement in the city of New York, where both the plaintiffs and Lewis resided, and were engaged in the purchase and sale of potatoes, that the defendant, who resided in Wells River, in this State, should purchase potatoes during that season in Vermont and New Hampshire, taking the advice of the plaintiffs and Lewis, from time to time, in regard to the price, amount, and market of such purchases; that the defendant was to devote his whole time to this business, and was to have six cents per bushel to cover the expense of buying and carrying the potatoes, which sum of six cents per bushel was

to be added to the cost of the potatoes; that if it should become necessary in the course of such purchases for the defendant to visit other parts of the country, the expense thereof should be borne, one-half by the defendant, one-quarter by Lewis, and one-quarter by the plaintiffs; that the defendant was to send the potatoes purchased by him to such market as he should think best, advising however, on this subject, with Lewis and the plaintiffs; that all the potatoes, which the defendant should purchase and send to New York were to be taken by Lewis or the plaintiffs, and sold at the highest market price by the one who should receive them, such party charging nothing for selling, and each to be accountable for their own sales; and if the defendant chose to send any of the potatoes purchased by him to any other market than New York, he should be accountable for the amount of the sales thereof; that all the expenses of transportation of the potatoes to market were to be paid by the defendant, and added to the general costs of the potatoes, and at the close of the season the profit or loss on all the potatoes purchased by the defendant were to be apportioned among the parties as follows: to the defendant one-half, to the plaintiffs one-quarter, and to Lewis one-quarter; and that if the defendant at any time needed more funds than he had for such purchases, he might draw on Lewis, or on the plaintiffs, in such a manner and to such an extent that the defendant should furnish one-half of the money for such purchases, the plaintiffs one-quarter, and Lewis one quarter.

The auditor further reported that in pursuance of this agreement potatoes were purchased by Whitcomb, and sent to market and sold by the other parties, and that upon an adjustment of the claims of the plaintiffs against the defendant, arising out of such purchases and sales (which were the only matters embraced in the plaintiffs' account), including the defendant's share of a loss in said business, computed according to the terms of the agreement, he found that the defendant was indebted to the plaintiffs in the sum of $848.45.

The auditor further reported that at the time the above-

mentioned arrangement was made, nothing was said between the parties about a partnership, and the auditor found from the foregoing facts that neither of the parties at that time supposed they were forming a partnership, or intended to form one.

The defendant insisted before the auditor, as well as before the County Court, that this arrangement constituted a partnership between him, the plaintiffs, and Lewis, and claimed that the affairs of such partnership could not be adjusted in this action.

But the County Court rendered judgment upon the report for the plaintiffs for the amount reported by the auditor, to which the defendant excepted.

ALDIS, J. As this is a case where the rights of the partners *inter se* merely are concerned, where no question as to third persons is involved, the criterion to determine whether the contract is one of partnership or not, must be, what did the parties intend by the contract with which they made as between themselves?

If we regard the agreement itself, as set forth in the auditor's report, it is clearly a partnership. The agreement was verbal, but by the finding of the auditor may be considered as in writing at this time. Giving to the contract, as stated in the report, the same construction that we should to articles in writing of the same tenor, it appears to us to have every ingredient of a partnership.

The parties all furnish a share of the capital, Whitcomb one-half, Lewis one-quarter, the Duryeas one-quarter. They jointly own the property when purchased. It is purchased in order to be sold again for their joint and mutual benefit, thereby negating the idea of separate control and disposition of their interests in the property purchased, and of separate interests in the proceeds. Each is to share in the final profit or loss; at the close of the season the profits or losses are to be divided, to Whitcomb one-half, to Lewis a quarter, to the plaintiffs a quarter. Each is to aid in selling, and to contribute his aid, skill, and knowledge to get the highest price.

The case of Griffith & Co. *v.* Buffum & Ainsworth, 22 Vt. 181, where the defendants were held to be partners as between themselves, is not so strong to show a partnership as this; for there the agreement to share in the losses seems to have been implied, whilst here it is expressed.

The fact that each was to be accountable for his own sales, amounts only to this, that each should sell for cash; if either did not, he was to be accountable for his sale as cash. The proceeds of the sales by each would belong to them jointly, not severally. This provision is as consistent with an agreement for a partnership as with any other: Noyes *v.* Cushman, 25 Vt. 390. So that Whitcomb was to have the control of the potatoes, and to run them to the best market, taking the advice of Lewis and the Duryeas on the subject, is, when we consider where the parties resided, where the potatoes were to be bought, and to what markets they might be sent, and that Whitcomb was to buy them, as consistent with a contract of partnership as with any other.

I. This agreement does not belong to the class of cases where the parties are jointly interested in certain proportions in the property purchased, but not in the final profits or losses; where each of the part owners has the power of separate disposition of his interest. Such is the case of Coope *v.* Eyre, 1 H. Bl. 37, a leading illustration of the class.

II. It is not of the class where a party receives a portion of the profits as a compensation for his labor as an agent or servant. Each furnished a portion of the capital, each was a part owner of the property when purchased, and of the proceeds when sold. Neither could be said to be the servant or agent of the other. An agent who receives a share of the profits as a compensation for his services, is not expected to share in losses; if there are no profits he loses his labor or wages, but he loses no more, though there are further losses to be borne by the partners.

Of this class is Kellogg *v.* Griswold, 12 Vt. 291; and Mason *v.* Potter, 26 Vt. 722.

III. Nor is it a case where a share of the gross or net earn-

ings is to be paid as a compensation for the use of capital, or as rent; and where the party receiving such compensation has no interest in the business, the property and the proceeds, but only a right of action against the other parties. Here the parties jointly contributed capital, labor, and skill, were joint owners of the property from the time of its purchase till the final division of profits or loss. No severance of their interests could be had, no ascertainment of their respective shares or interests could be made, till a final accounting. They must have relied on the property and its proceeds to secure to each his final share, no matter by whom the property might be sold, or its proceeds held.

Hence the cases of Tobias *v.* Blin, 21 Vt. 544; Bowman *et al. v.* Bailey, 10 Vt. 170, and Bradley *v.* Ambler, 6 Vt. 119, do not apply. Of the same class are Denny *v.* Cabot, 6 Met. 92; Holmes *v.* The Old Colony R. R. Co., 5 Gray, 58; Loomis *v.* Marshall, 12 Conn. 69, and various other cases cited by counsel.

It is said, however, that the author finds that the parties did not intend to form a partnership, and that such intention must govern.

It is with contracts of partnership as with all other contracts, that as between the parties to them their intention must govern. Hence an express stipulation in a contract that the parties thereto shall not thereby become partners, is binding and of great significance in giving construction to the instrument, especially if the terms are doubtful or susceptible of more than one meaning.

1. It is to be noted that in this case there was no such express stipulation. The auditor's report says, "at the time of the arrangement in New York, August 20, 1854, nothing was said about a partnership, and neither of the parties at that time supposed they were forming a partnership, or intended to form a partnership." As nothing was said about a partnership, the parties could not have stipulated that their contract should not create one.

2. The report states what was the arrangement of August

20, 1854. That was a contract for a partnership. If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. One is at a loss to perceive how the auditor could discover such an intention when nothing was said about a partnership, and when the contract, which they made, was a partnership. Probably the fair construction of the report is that the parties were not aware of the legal extent and obligation of the contract into which they entered.

As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses.

IV. The action is book account. The accounts presented for adjustment are all partnership accounts. None of them are properly chargeable on book. The case of Green & Roberts *v.* Chapman, 27 Vt. 236, has settled the construction of the statute of November 18, 1852, viz.: that where there are no items properly chargeable on book, the action of book account will not lie for the adjustment of other items proper for the action of account.

The result is that the judgment of the County Court is reversed and judgment rendered for the defendant to recover his costs.

Wentworth's Lindley, 7, 10; Pierce *v.* Shippee, 90 Ill. 371; Morse *v.* Richmond, 97 Ill. 303; Marsh *v.* Russell, 66 N. Y. 288; Meaher *v.* Cox, 37 Ala. 201.

Stevens *v.* Faucet.

Supreme Court of Illinois, 1860.

24 Ill. 483.

Caton, C. J. The decision of this case depends entirely upon the determination of the question whether, as between themselves, the firms of Stevens & Co. and Faucet & Co. were partners in the purchase and tanning of these hides, and the sale of this leather. If they were such partners, then the defendant below was a joint owner with the plaintiffs of the leather which he surreptitiously took away and converted to his own use, for which this action of trover was brought. The agreement between the parties was this:

"It is this day agreed between Faucet, Isham & Co., of New York city, and W. H. and F. Stevens, of Stevensville, Sullivan County, New York, that said Faucet, Isham & Co. shall send to said W. H. and F. Stevens, what hides they may require for the purpose of being tanned, and manufactured into sole leather in their tannery, at said Stevensville, for three years from this date. The number of hides is not to be less than fifteen thousand each year, nor more than twenty-five thousand each year, unless both parties, in writing, shall hereafter agree to increase or lessen the amount.

"W. H. and F. Stevens, during the said three years, are not to tan hides for any other party. W. H. and F. Stevens agree to receive the hides at a dock in the city of New York, to pay all expenses of transportation to their tannery, to tan and manufacture them into sole leather in a good and workmanlike manner, to make leather of a quality and a gain in weight equal to that made by all first-class tanners, and to return the leather so tanned to said Faucet, Isham & Co., at a dock in the city of New York, clear of all expenses of transportation. For all which services, Faucet, Isham & Co. agree to pay said W. H. and F. Stevens five (5) cents per pound for each pound of leather so tanned and returned, which shall be due at the average time of each invoice.

"It is further agreed that all the profit and loss on all the leather manufactured under this contract shall be equally divided between both parties, which shall be determined as follows: After said Faucet, Isham & Co. shall have sold the leather manufactured from each invoice of hides, they shall deduct from the gross amount of such sales the cost of the hides, with five per cent. added thereto, the amount paid and payable for tanning. All costs and charges of cartage on both hides and leather, inspection, exchanges, and interests on all these amounts, till the sales are due, by average. Also six per cent. on the gross amount of the sales, and the balance or difference, being gain or loss, shall be equally divided between said Faucet, Isham & Co. and said W. H. and F. Stevens. Faucet, Isham & Co. are to take the sole risk of all sales made on credit.

"W. H. and F. Stevens agree to return the leather from each invoice of hides within eight months from the time they leave the city of New York, provided that each invoice shall not exceed one thousand hides. In such case they agree to return them in a fair proportionate time; and provided further, that in case hides are sent faster than they can be worked, an allowance shall be made in proportion. Faucet, Isham & Co. shall procure what insurance against fire they may think necessary, one-half the cost of which shall be paid by W. H. and F. Stevens.

"New York, August 7, 1855."

As we are investigating this question of partnership for the purpose of determining in whom the legal title to this leather was vested, it is of paramount importance to determine what was the intention of the parties on that point, as manifested by this agreement. It must be remembered that this is not a question between third persons and the parties to the agreement, growing out of the subject-matter of the agreement, but it arises between, and affects only parties to the agreement. In such a case the intention of the parties must control, in this as well as in all other agreements, when that intention can be satisfactorily ascertained by the terms of the agreement.

After the most careful and scrutinizing consideration we

have been able to give this subject, we are well satisfied that it was the intention of the parties that the title to the hides and leather should all the time remain in Faucet, Isham & Co. By the first paragraph, Faucet, Isham & Co. agree to send what hides they may require to the Stevens, for the purpose of being tanned, for three years.

By the second paragraph, the Stevens agree not to tan hides *for any other party.* They agree to receive the hides, transport them to their tannery, to manufacture them into sole leather, and to return the leather, so tanned, to Faucet, Isham & Co. at a dock in New York, clear of all expenses of transportation. *For all which services* Faucet, Isham & Co. agree to pay the Stevens five cents per pound for each pound of leather so tanned and returned. Here is simply an agreement for work and labor of one party, to be performed upon the material of the other party, for a stipulated compensation, and so the parties understood and intended. Of this there can be no doubt. More appropriate terms for expressing such intent could not have been selected.

The next paragraph stipulates that the profit and loss on all the leather manufactured under this contract should be equally divided between both parties. And the balance of the paragraph shows what Faucet, Isham & Co. should charge against the proceeds of the leather when sold, in order to ascertain the gain or loss, which was to be equally divided between the two firms. This, no doubt, constituted a partnership, but in what, or to what extent, is the question to be determined. Was it the intention of this provision to change the relations which had been established in the preceding part of the agreement? We think it was, to the extent there stated, and no farther. It gave the Stevens a right to one-half the profits which Faucet, Isham & Co. should realize by the transaction, and obliged them to pay one-half the losses which should be sustained, but gave them no interest in, or title to, the hides or leather. It was manifestly still the intention of both parties that the title to the property should belong to Faucet, Isham & Co. If such was their intention, the partnership only extended to the

proceeds of the leather, and not to the leather itself, or rather, to the profit or loss resulting from the transaction. Does the law forbid such an arrangement when the parties so desire and design it? We think not.

Suppose, after what is now written in this agreement, the parties had added a declaratory clause, stating that it was not the intention of the parties to form a copartnership, either in the purchase of the hides, or in the manufacture or sale of the leather, but only that the Stevens should be entitled to an account after the leather was sold, and to share in the profits or loss when ascertained. Had this been done, none will contend that this declaratory provision would be nugatory, as contrary to any established legal principle. We think the same intention of the parties is manifest from the terms which they have used in this agreement. It is as manifest that all parties intended that Faucet, Isham & Co. should own, hold, and control the hides and leather as if it had been so declared in distinct terms, and in a separate clause. Indeed, to have inserted such a clause would have been but mere repetition, for the intention is as manifest now as it would be then. When the Stevens agreed to tan hides for Faucet, Isham & Co. for a stipulated price per pound, which the latter agreed to pay them, can any one doubt that it was the intention of both parties that the Stevens should have a right to sue the other parties at law for the price agreed upon? Was it the intention of either party that Faucet, Isham & Co. should be liable to the workmen employed by the Stevens in the manufacture of this leather? And yet these consequences would follow if they designed to form a partnership in the purchase of these hides and the manufacture of this leather. Such was clearly not their intention. Although sharing in the profits and loss of a concern or enterprise ordinarily creates a partnership in such concern or enterprise, between the parties thus sharing the profits and losses, yet it will not always do so. Suppose the third paragraph in this agreement had been omitted, and a third party had heard of the arrangement, and, believing it would be a profitable undertaking, had offered Faucet, Isham

& Co. $10,000 if they would pay to him one-half of the profits which they should make by the operation, and they had accepted the offer; but they, being cautious men, and having some doubts of the success of the enterprise, gave another party $5,000 to insure them against loss, or had even purchased such insurance of the same party to whom they had sold the half of the profits, we conceive no partnership in the purchase of the hides and the manufacture of the leather would have been created between the parties to such an agreement, and for the very good reason that it would not be their intention to create a copartnership. There would be no intention to vest in the party to whom they had sold a share of the profits, any title to, or interest in, the leather, but simply an interest in the profits. If the inquiry be made, why was this arrangement to divide the profits and losses made, if there was no design to create a partnership in the manufacture and sale of this leather, we think it is not difficult to answer the question. The inducements to this provision are quite obvious. The price agreed upon for tanning these hides was a low one. The evidence shows that the hides were about doubled in value by the process, and the price agreed upon for the manufacture of the leather was less than a quarter of its value when manufactured, leaving an apparent profit of more than fifty per cent. on the money which Faucet, Isham & Co. would be required to invest in the purchase of the hides. This could not have escaped remark in the negotiation, and if such profits should be realized, it was but reasonable that the manufacturers should receive a greater compensation for their labor. Both parties might well have deemed it for their mutual interests to provide that a part of the price for the work and labor to be performed should be contingent, dependent, to a certain extent, upon the manner in which that work should be performed. In this way a higher inducement to perform the work well was presented than if they were to receive a fixed compensation to the full value of first-class work. This arrangement was, manifestly, but a mode adopted for part payment for the work to be performed. Such cases are almost

of daily occurrence in the transaction of business and in the courts. The case of Porter *v.* Ewing, decided at this term, was one where a party was to receive compensation for services to be performed in an enterprise by receiving half the profits resulting therefrom. There we held that the party had no interest in the property bought and sold in the prosecution of the enterprise, but only in the profits, when profits should be realized and ascertained, although the party who was held not to be a partner was, by the agreement, made the active man of the concern, and actually did all the buying and selling of the property.

We are well satisfied that it was the intention of all the parties to this agreement that the title to this property should be vested and continue in Faucet, Isham & Co., and that the defendant was liable to them for its conversion.

Some other minor questions were made, but one of which we deem it necessary to notice. It was objected that the manufacturers had a lien on the manufactured articles for work bestowed upon it, and hence, they had such an interest in it as would protect them from an action of trover and conversion. By the provisions of the contract, they relinquished the right to such lien. They agreed to deliver the leather without requiring prepayment for their work. This of itself would destroy the lien. But admitting such lien existed, this tort was committed by but one of the partners entitled to the lien, while the other was entirely innocent. The tort-feasor could not, by his wrongful act, appropriate to himself the whole amount due to himself and his copartner. This conversion by one partner would not justify Faucet, Isham & Co. in refusing to pay the other partner or the firm the amount due them for the work done.

We find no error in the record, and the judgment must be affirmed.

Judgment affirmed.

Dwinel *v.* Stone, 30 Me. 384; Edwards *v.* Tracy, 62 Pa. St. 374; McDonald *v.* Matney, 82 Mo. 358; Clifton *v.* Howard, 89 Mo. 192; Osbrey *v.* Riener, 51 N. Y. 630; Bullen *v.* Sharp, L. R. 1 C. P. 86; *Ex parte* Delhasse, 7 Ch. D. 511, 521.

(*c.*) Participation in Profits, no Agreement as to Losses.

BEECHER *v.* BUSH.

Supreme Court of Michigan, 1881.

45 Mich. 188.

Ante, page 46.

JOINT OWNERSHIP.

VOORHEES *v.* JONES.

Supreme Court of New Jersey, 1861.

29 N. J. Law, 270.

THE CHIEF JUSTICE. The only question at the trial was, whether the defendant was a partner in the firm of Seymour & Tower. The Court directed a verdict for the defendant, upon the ground that the plaintiff had entirely failed to give any legal evidence of the partnership; that neither the agreements and documents offered in evidence, nor the testimony of the witnesses, showed any such agreement to participate in the profits of the business as to make Jones responsible to creditors.

The action of the plaintiff was upon a note made by Seymour & Tower.

The rule is well settled that whenever a person becomes entitled to an actual participation in the profits of the joint business as profits, so as to entitle him to an account and give him a specific lien on the partnership assets for payment of his share of the profits, in preference to the creditors of the individual partners, he becomes a partner as to creditors of the firm, although it may be expressly agreed between them that he shall not be so considered. The members of a firm cannot enjoy all the benefits of a partnership and, by a secret agreement among them that they shall not be so considered, exempt themselves from the liabilities that flow from the relation: Brundred *et al. v.* Muzzy & Welles, 1 Dutcher, 279; Coll-

yer on Part. 81; Waugh *v.* Carver, 1 Smith's L. C. 968; 2 H. Black. 235; Grace *v.* Smith, 2 W. Black. 998; Cushman *v.* Bailey, 1 Hill, 527.

But if the profits are taken in the character of an agent or servant as a mere compensation for services, and the party is so held out to the world, he is not, even as to creditors, held to be a partner. It seems to me that the true limitation upon the general rule is very clearly expressed by Story in his work on Partnership, § 38. This is the rule in Massachusetts, Denny *v.* Cabot, 6 Metcalf, 82; in Connecticut, in Loomis *v.* Manhall, 12 Conn. 69; Perrine *v.* Hankinson, 6 Halst. 181; in New York, Vanderburgh *v.* Hull, 20 Wend. 70; 3 Kent's Com. 25, 4th ed.; Champion *v.* Bostwick, 18 Wend. 184.

This limitation upon the rule seems eminently just. Why should a mere employee of a firm, who is bound to obey orders to transact all the business under the direction of his superiors, who has no control over the operations of the firm, who cannot limit its operations or direct its investments, be held liable to creditors, the contraction of whose debts he could not prevent if he had desired, and this not because he had agreed to become a silent partner, but merely because his compensation was contingent upon the success of the business?

The Judge at the circuit thought the case now before the Court fell within the principle of the cases just cited, and so ruled when he directed a verdict for defendant. Seymour & Tower were contractors with the Northern Railroad Company for the building of their road, and also had an agreement for the lease of the road. The firm was engaged in the construction of the road, and the plaintiff's debt was contracted for services in laying the track.

On the 6th of February, 1858, Seymour & Tower agreed, under their hands and seals, to pay over to one Thomas Cummings, Jr., the one-third part of the net profits of the contract for building the road, when received by them, and also the one-third of the net profits to be made from the running of the road. The paper declares that these payments were to be

made to compensate him for services in procuring the contract from the company, and by it he stipulates to give them the benefit of his experience, skill, and judgment in the construction of the road.

On the 8th day of November following, Cummings, by an assignment indorsed upon the last-mentioned agreement, conveyed to Dana & Jones, the defendants, his entire interest in the "within described contract for constructing and equipping the Northern Railroad of New Jersey, made between Seymour & Tower and the company, and one-half of his interest in the lease of the road, thereby giving Dana & Jones the entire control, benefit, and advantage of his interest thereby assigned. The consideration expressed in this agreement was $20,000, paid by them to Cummings.

I think the legal effect of the agreement between Seymour & Tower and Cummings was not to make him a partner with them. He was to be paid for his services rendered in procuring the contract to build the road and the lease one-third part of the net profits of the construction and also of the lease. It was a compensation for his past and future services as an employee of the company; he was not to have any control over the work or any lien on the profits in preference to the creditors of the partners. The agreement does not convey to him in terms any interest in the business or contract; it is a simple covenant to pay to him one-third of the profits, when received by Seymour & Tower; he has no right to receive them himself. The agreement seems to have been drawn with a view to the rules regarding the liability of an employee, agent, or servant, so as not to charge Cummings with any responsibility.

If the parties intended that Cummings should have all the substantial rights and powers of a partner, the agreement does not express by its terms that meaning, nor does the assignment of his interest by Cummings to Dana & Jones do anything more than transfer Cummings's rights to Dana & Jones by its terms of *assignment*. Cummings could only assign what he had.

But in this assignment Cummings and Dana & Jones put a construction upon the agreement between Cummings and Seymour & Tower, which, if it was what the parties intended by that agreement, alters very materially its scope. The matter assigned is stated to be his interest *in the contract* for constructing and equipping the Northern Railroad and half his interest in the lease.

If Cummings was to be relieved from the responsibility of a partner it was because he had no interest in the business, but was a mere agent or employee having no control over the business, receiving by contract personal to the partners, and not affecting the partnership business a compensation for past and future services, ascertained and rated by what the share of the profits mentioned would amount to. If, therefore, Seymour & Tower, by any paper executed between them and Cummings, by expression or fair implication, so modified the original contract by which Cummings acquired his rights as to give his assignees a share in the contract and lease and the business, and entitle them to the substantial rights of partners in the control of the business and the receipt of its profits, then, by force of such modification, they became partners.

This brings us to the consideration of the agreement of the 10th of November, sealed by Seymour & Tower and Jones & Dana. It recites that Jones & Dana had, with their consent and approbation, bought the entire interest of Cummings in the contract for construction and equipment, and one-half his interest in the lease, for $20,000, and that Jones & Dana had agreed to assist in raising money for the completion of the work, by the use of their own and their friends' names and influence, and had assisted before that in the same way, and Seymour & Tower agreed that the $20,000 should be paid out of the price for construction, and should be charged to profits and loss before any division of the profits of the contract, and they thereby assigned, sold, and transferred to Dana & Jones one-sixth part of the entire contract for construction and equipment of the road, and one-fourth part of the entire lease of said road, with all the benefits, profits, and advantages

derived and to be derived from the construction, equipment, running, and working of said railroad under said contract and lease, it being the intention of this agreement to make the interest of Dana & Jones, in all respects, equal with Seymour & Tower's interest in both said contract and lease. After other stipulations, the closing stipulation is that the business shall be conducted in the name of Seymour & Tower. By this agreement, beyond a doubt, Seymour & Tower and Dana & Jones became partners, not only as to creditors but *inter sese.*

It was not a mere ratification of the transfer of Cummings's rights to Dana & Jones, but a sale of the one-sixth interest in the construction contract, with all its privileges and benefits, to Dana & Jones. It was a sale and conveyance of an interest in the business itself, with its profits, an interest which Dana & Jones acquired by the assignment directly from Seymour & Tower, and not through Cummings. Cummings sold them one-third, Seymour & Tower had two-thirds; they sold them one-sixth—that is, divided the odd one-third which they had more than Dana & Jones, between them, and thus made them all equal in that contract. They also sold them one-fourth of the lease itself, in so many words. They already had one-sixth, which they bought of Cummings, which gave them five-twelfths, leaving also five-twelfths of the lease in Seymour & Tower, and one-sixth in Cummings, which he had not sold to Dana & Jones. The agreement was not to pay a part of the profits to them for services, but an absolute sale of an interest in the business of Seymour & Tower, which carried with it, as a consequence, the right to a share of the profits.

The agreement expressly declares it to be the intention of the parties to make the interest of the parties in the contract and lease equal. What was the contract? It was a right to do certain work for the railroad company. What was the interest in the contract but an interest in the job, in the right to do the work? It was to be a joint interest in doing certain work, and getting the payment for it, giving to all the parties having this joint interest equal control and equal responsibilities.

I cannot see how a clearer interest in a partnership and its business can be created than was done by this agreement short of words saying that they are admitted as partners.

It is to be observed that they were to have this interest in consideration of services they had rendered in the financial department of the business, which they were to continue to render. They not only had an interest in the profits, *as such*, but that interest arose not from an agreement to pay them, but because of a conveyance of the fund out of which they were to come.

There was no agreement that they, Seymour & Tower, should do the work without them, and they reap a part of the profits; on the contrary, they and their friends were to contribute credit and money, by which the work was to be carried on.

The learned Judge erred in the construction which he put upon the contracts.

But it was argued that the defendant, Jones, was not a partner, because, although he might so appear by the papers, he acted as a mere *locum tenens* for Demarest, the president of the road; that it was verbally understood among all the parties that Jones had no interest; that what appeared to be his was in reality Demarest's.

It was objected, at the trial, that this verbal testimony, inconsistent with the import of the papers, was not admissible.

If, therefore, as was urged, all the parol evidence showed this understanding, was parol evidence competent for that purpose? and, if competent, did it show anything more than that Jones was a trustee without beneficial interest? These are the questions to be decided. And—

1. Was it admissible?

The creditor says—You, by the agreements between you, which, in an action against you by Jones would conclude you, are partners. Jones replies—True, I can hold them as partners, and so can they me, and the verbal agreement would be no defense to them or me because we are parties to it; you are

not, and therefore we are not estopped by them from showing the true relation between us. The answer is, that although the creditors are not partners to the agreement in writing they are so far privies in contract as to give them the right for their own protection to enforce the legal obligations of the partners to one another, to contribute to a joint fund for the benefit of creditors, and the rule excluding parol evidence which would be inadmissible between the parties applies in favor of creditors of those who have thus agreed to be jointly bound.

I think it is clear that in a suit by a creditor for his debt a person who by the articles appears to be a partner shall not be permitted to show by parol evidence that he never was, that the instrument did not contain the true agreement. That was the effort in this case.

It is another question whether his retirement from the firm may not be proved by parol. The evidence was inadmissible for the purpose offered.

As to the second question, the evidence, even if received and weighed, showed that Jones agreed to take the liabilities of a partner without the profit for the benefit of Demarest, to enable him to perpetuate a fraud on the directors of the company of which he was president. They permitted him to manage the affairs of the company on the ground that his interest was adverse to that of the contractors, and Jones took his place as partner in the contract to enable him to commit this fraud.

A party who agrees to be an ostensible partner, or is so *inter sese*, is liable for the debts of the firm, although there may be a collateral agreement between the partner and a third person that he is to have all the profits of the partner: Collyer on Part. 385; Story on Part. 670, and cases there cited.

Whether Jones had retired from the firm as the partner, and Demarest taken his place, so as to dissolve the legal relation between Jones and the other partners, and form a new one between Demarest and them, was a question of fact, which ought to have been submitted to the jury. Whether the assignment alluded to by Jones in his evidence, and also by Demarest,

passed the entire interest of Jones to Demarest does not seem to have been shown ; the assignment was not produced at the trial, and was itself the best evidence of what passed by it. Nor does it satisfactorily appear that it ever was delivered with a view to put an end to Jones's ostensible interest. Nor did it appear by the evidence that its execution and delivery was ever known or assented to by Seymour & Tower.

. The fact of its being handed back to Jones would seem to indicate that it was never permanently out of his possession. Demarest did not admit that he took the interest of Jones, whatever it was, or assumed his place in the firm. It is sufficient that the assignment was not legally proved.

It was objected that Jones was not a competent witness because he had neglected to answer the interrogatories served by plaintiffs within fifteen days : Nix. Dig. 888.

The answers to the interrogatories were served on the plaintiff 's attorney on the first day of the term. He was not bound to receive them at that time, but he did so without objection. That was a waiver of the objection, particularly as he permitted the case to proceed without objection until after he had rested his case. By receiving them, and keeping them without objection until the defendant's hands were tied, he precluded himself from the benefit of the objection.

Although I cannot see what power the Judge had at that stage of the case, without the notice of two days which the Act requires, to give further time to answer them ; if the first answers were well served this could not have prejudiced the party.

There is another answer to this objection. The Act provides that, in default of answering the interrogatories, the party shall not be allowed to testify in his own behalf on the trial of the action. This must mean in cases where he then was permitted so to do, unless we hold that clause, by implication, to have made him competent in his own behalf when he did answer them. The right, as it then existed, was to testify in his own behalf when called by the adverse party. This provision was a limitation on that right, not an extension of it.

When therefore, by the subsequent Act of 1859, the party to the suit was made a competent witness in all cases, his right to give evidence in his own behalf was given without any such restriction. In this case Jones was not called by the plaintiff, but in his own behalf. He was competent within the strictest construction of the Act of 1859, even if we should not hold, as I think we should, that the Act of 1859 allows the testimony of the party in all cases, no matter by whom called, even when he has failed to answer interrogatories.

The verdict should be set aside, and a new trial granted, that a verdict may be had on the issues of fact involved in the case. I am not satisfied that justice has been done in the case. It is plain that either Jones or Demarest is liable to the plaintiff. I think there would be gross injustice done by discharging Jones until there is ample proof that Jones had assigned his interest and Demarest taken it when the note was made.

Richards *v.* Grinnell, 63 Ia. 44; Tyler *v.* Scott, 45 Vt. 261; Citizens' Bank *v.* Hine, 49 Conn. 236; Doak *v.* Swann, 8 Me. 170; Sankey *v.* Columbus Iron Works, 44 Ga. 228; Hill *v.* Sheibley, 68 Ga. 556; Staples *v.* Sprague, 75 Me. 458.

NO JOINT OWNERSHIP.

Stevens *v.* Faucet.

Supreme Court of Illinois, 1860.

24 Ill. 483.

Ante, page 64.

Wentworth's Lindley, 12, 15 *et seq.;* Morrison *v.* Cole, 30 Mich. 102; Dwinel *v.* Stone, 30 Me. 384; Bull *v.* Schuberth, 2 Md. 38; Flint *v.* Marble Co., 53 Vt. 669; Parker *v.* Fergus, 43 Ill. 437; Hunt *v.* Erickson, 57 Mich. 330; McArthur *v.* Ladd, 5 Ohio, 514; Cassidy *v.* Hall, 97 N. Y. 159; Prouty *v.* Swift, 51 N. Y. 594; Ashby *v.* Shaw, 82 Mo. 76; Ford *v.* Smith, 27 Wis. 261.

(*d.*) Participation in Profits with Agreement against Losses.

ROBBINS *v.* LASWELL.
Supreme Court of Illinois, 1862.
27 Ill. 365.

BREESE, J. The only or principal question of law presented by this record, arises out of the following agreement and indorsement thereon:

"Memorandum of an agreement, made this 1st day of March, 1853, between Silas W. Robbins, of the first part, and Thomas Laswell, of the second part: Witnesseth, that the said Robbins, party of the first part, has this day advanced to said Laswell, party of the second part, two hundred and fifty-four dollars, to buy young cattle, heifers, steers, yearlings, etc., with, and said Laswell is to feed, salt, handle, and manage said stock well, in every respect, and to have proper oversight and care in regard to said stock during the next grass season, and if not sold in the fall for small beeves or otherwise, said Laswell is to winter well the next winter, and have them in good order to go on the grass of the spring of 1854, and said Laswell is to sell them all in one year from this date, if deemed practicable, and is to be at all expense and trouble in feeding and salting said stock, supposed to be about forty head, and in selling them, and the stock are to belong to said Robbins till the above sum of two hundred and fifty-four dollars is returned, and the profits to be equally divided between the parties, and said Laswell guarantees that the portion of profits coming to said Robbins shall not be less than 20 per cent. per annum on the above sum.

"Witness our hands and seals, the day and date first above.

"SILAS W. ROBBINS. [SEAL.]
"THOMAS LASWELL. [SEAL.]"

On the back of said agreement was an indorsement as follows:

"The within agreement shall include the purchase of eleven

head of yearlings, and five head of two-year-old bought at the sale of Ira C. Ash, made on the 29th day of April, 1853, and in payment, the undersigned have executed their joint note to Antrim Campbell for $120.70, with six per cent. from date till paid, in twelve months from the 29th April, 1853, being the date of sale, and as these cattle are bought on credit, the profits are to be equally divided.

"Witness our hands, this 30th day of April, 1853.

"Silas W. Robbins.
"Thomas Laswell."

Does this agreement constitute a partnership, and was it extended by the mutual understanding of the parties, and for what time? The theory of the plaintiff in error is that this agreement, made the parties to it, partners not in the stock purchased, but in the profits arising from its sale, and that although limited by its terms to one year, and embracing only the stock to be bought with the money therein specified, yet it was continued, by the mutual understanding and tacit agreement of the parties, to three years, and by the same understanding, was included all stock purchased within that time, and for which the defendant in error ought to account. It will be seen, by the indorsement on the agreement, the stock bought of Ash in April was, in express terms, made subject to this agreement, and it is to be determined, by the testimony in the cause, whether the stock subsequently purchased was to be embraced within it.

But first, as to the question of a partnership and its extension. The defendant in error contends that such a relation has not been established by any certain proof—that the testimony to that point is too loose, uncertain, and unsatisfactory to convince the mind of its existence, and that the plaintiff, holding the affirmative, should make it appear by clear and satisfactory evidence. He further urges, that if a partnership really existed, as to the stock purchased under the agreement of March, and which was made to include the stock subsequently purchased of Ash by a special indorsement thereon,

that the conduct of the plaintiff in error, in his dealings with the defendant, is inconsistent with the theory that this contract was extended and enlarged by a parol understanding of the parties, so as to include all stock purchased during the three years in which the parties transacted the business of buying and selling this kind of stock. He cites the fact that the Ash cattle, by special indorsement on the agreement, were made to be included in it, and asks the question, how it was that the greater interests which accrued subsequently, by large purchases of stock, were not manifested by some writing between the parties, and he concludes from this fact that there was no parol extension of the written contract of March.

We cannot say what may have influenced the parties to have observed less caution as their business increased, but we do not suppose it was obligatory on them to put their mutual understanding in writing, if they deemed themselves able to show, by facts and circumstances, which speak louder than words, that their conduct could not be reasonably referred to anything else but the written contract. It may be a mutual confidence had been inspired, and so strong as to render unnecessary the usual safeguards and strictness with which business of this nature is commonly surrounded. A fact is referred to by the defendant in error, as conclusive, in his judgment, that no partnership existed in the stock acquired after the date of the first contract, and that is that at an arbitration in the spring of 1856, between these parties, the plaintiff in error was sworn as a witness, and then testified that he and the defendant were not, and had never been, in partnership "in a hoof of stock."

This does not, in our judgment, militate against the theory of the bill. The plaintiff does not allege a partnership in the stock purchased. That he claims as his own, and for which he is to be reimbursed. He claims only that the defendant was a partner with him in the profits to be realized from the sale of this stock, and which, by the agreement, could in no event be less to the plaintiff than twenty per cent. per annum on the money advanced by him.

Now, the question properly arises here, does this agreement make a partnership? As between themselves, we think there can be no doubt. It seems to be well settled that when, by agreement, persons have a joint interest of the same nature in a particular adventure, they are partners *inter se*, although some may contribute money and others labor. As in the case of Reid *v.* Hollinshead, 4 Barn. & Cress. 878, where ABBOT, Ch. J., said "Such a partnership may well exist, although the whole price is, in the first instance, advanced by one party, the other contributing his time and skill and security in the selection and purchase of the commodities." If, then, parties agree to share the profits, they are partners in the profits, although one contributes the capital or goods, and the other only trouble. Such is the case made by this record. The plaintiff in error furnished the stock by his capital employed in its purchase, and the defendant his time and trouble in preparing it for market, and making sales. It is not necessary that the parties should agree to share in the losses: Story on Part., § 15; Dob *v.* Halsey, 16 Johns. 34; Ferguson *v.* Alcorn, 1 B. Monroe, 160.

These parties were partners in the profits of the first adventure, as specified in the written agreement. Was that agreement extended and enlarged, so as to embrace the stock purchased subsequently, and up to the fall of 1855?

We have examined all the testimony in the cause with great care, and it is established, with sufficient clearness, that all the stock purchased, whether of cattle, hogs, or horses, was to be controlled by the written agreement of March. This was the tacit understanding of the parties, since it is not shown by any act of theirs, or by any declaration of either party, that they had terminated, or desired to put an end to the written agreement of March, at the end of the year, the defendant admitting, on several occasions, that the plaintiff furnished the money, and when he was reimbursed his advances, the profits were to be equally divided between them. To what else but to this written agreement can the acts and conduct of these parties to be referred, no new or different agreement being

set up or shown, and no extension in writing being necessary?

If a person leases a house for one year at a stipulated rent, and holds over another year, he will be adjudged to hold under the terms of the agreement for the first year, nothing to the contrary being shown. It is not at all probable that the defendant would draw, and the plaintiff accept and pay orders for stock for three years, and to the amount of near $4,000, unless it was the tacit understanding of these parties that all these transactions were under the agreement of March, and to be controlled by it.

The defendant contends, however, even if the subsequent purchases of stock were included in this agreement, that they have been settled and adjusted, and an exhibit marked C is relied on to sustain this view.

This paper is proved to be in the handwriting of the plaintiff, and was produced by the defendant on the hearing, and is claimed by him as the account rendered by the plaintiff against him, and as containing a full statement of their transactions growing out of their agreement. The paper bears no date, nor is it shown it was made out by the plaintiff for any purpose of a settlement, or delivered by him to the defendant. Being in the handwriting of the plaintiff, it is evidence against him, as a memorandum at least, but subject to explanations. We have examined this exhibit, and do not understand that it purports to be an account stated, or anything of the kind. It appears to be a rough memorandum made by the plaintiff, perhaps with a view to a future settlement, and was probably made in the spring of 1856, after their difficulties had arisen. It contains a statement to the effect that the defendant had received of the proceeds of the "California sale" the sum of $1,504.01, and the plaintiff had received, of the same proceeds, $4,014. This certainly is not an account of their whole business, but of one sale only, and can charge the parties only so far as it goes. In it, a mistake against the plaintiff of a large sum, is clearly shown by the testimony. In this memorandum he is charged with having received, on the

sale of cattle to one Huber, the sum of $1,990, whereas, he received but $1,000 of that sum, the remaining $990 having been credited to the defendant and appropriated by him. The paper does not purport to be an accounting as to all the business of buying and selling stock in which these parties were interested, nor does it afford any satisfactory evidence of the true state of the accounts. Taking it for what it proves, it would show that out of the proceeds of a certain sale of stock, the plaintiff had received a certain sum of money, and the defendant a certain other sum. The stock remaining on hand and the profits on the sales do not appear.

The evidence is quite convincing that from the 1st of March, 1853, up to the spring of 1856, when the parties had a misunderstanding, the defendant was in the constant practice of purchasing cattle, hogs, and horses, and drawing bills for their price on the plaintiff, or placing his name to notes executed for the price, all which were promptly paid by the plaintiff, and claiming that he was entitled to one-half the profits. The whole amount thus paid by him, including the first advance in March, 1853, reaches to about the sum of $3,000, as appears from the testimony of the numerous witnesses whose depositions are in the record. But it is contended by the defendant that no claim that hogs or horses purchased by the plaintiff, and received by the defendant, can be considered as within this written agreement, inasmuch as that specifies young cattle only.

The proof shows that the hogs and horses were paid for by Robbins, in the same mode that he paid for the cattle, and the defendant himself, in exhibit C which he introduced as evidence, has claimed for, and been allowed his share of the proceeds of the sale of hogs. No new contract having been set up, as to the hogs and horses purchased, and the defendant claiming and receiving a credit for his share of the sale of hogs, and there being nothing shown but the written contract of March, 1853, to which to refer these transactions, we must, to effectuate justice, refer them all to this contract, as their real basis. The claim of the plaintiff to be reimbursed for

them, and for his equal share of the profits arising out of their sale, if sold, would seem to be quite as meritorious and well grounded as his claim to be reimbursed for the cattle and to be paid his share of the profits on them. No other basis but that contract has been exhibited. The claim of the defendant that all their dealings were adjusted and settled in exhibit C, does not seem to be well sustained, as no full account of purchases or of sales is therein exhibited, and no accounting as to the stock then on hand or as to the horses.

The evidence shows a considerable amount of property belonging to the plaintiff, in the possession of the defendant, and which he refused to deliver up to the receiver appointed by the Circuit Court, on filing this bill of complaint. He now asks, on what principle is it that the Court can decree that defendant should pay a specific sum to the plaintiff in money, if there be such property in his hands, and why not rather decree a division of the property, or pass an order for its sale and divide the proceeds? The answer to this, we think, is quite obvious. A division of the property, the whole of it being the property of the plaintiff, or of its proceeds on a sale, would not be just to the plaintiff. It would be giving the defendant that to which he is not entitled by the terms of the agreement. The stock undisposed of is the property of the plaintiff, and if the defendant has neglected to sell it, so that profits might be had, to one equal half of which he would be entitled, and has refused to place it in the custody of the Court, and has, as the proof shows, butchered and sold, and given away to his relations a considerable portion, the strongest considerations of equity would prompt the Court to decree against him, the value of such property as he has wrongfully endeavored to appropriate to his own use.

We think the theory of the plaintiff in his bill is sufficiently established by the evidence in the cause—that he bought the stock of cattle, hogs, and horses, which was his own property, and was to be reimbursed its value or cost, and such profits as might be made on the sale of it were to be equally divided between the parties. This is established with reasonable cer-

tainty, and there is nothing, we can discover, in the conduct of the plaintiff, and in the dealings of the parties, inconsistent therewith. This Court having jurisdiction, a partnership existing as to the profits, will hold the case and so adjudicate upon it as to do complete justice between the parties. To that end, it is decreed that the plaintiff be reimbursed the full amount of his advances for cattle, hogs, and horses, from March 1, 1853, to the end of February, 1856, and which came into the possession of the defendant by delivery or otherwise. That the plaintiff also have and receive of the defendant one equal part of the profits, which may have been derived from the sale of all or any part of said property, and that the testimony taken in this cause be referred to the master in chancery of the Sangamon Circuit Court, who shall therefrom make up a report, showing, first, the whole cost of the cattle, hogs, and horses purchased by the plaintiff, and which came to the possession of the defendant prior to March 1, 1856, under the agreement of March 1, 1853, and extended and enlarged by the parol assent of the parties to the time first mentioned; showing, second, the amount of profits derived on the sale of any portion of said property, giving to the plaintiff one equal half part thereof, and to the defendant the other equal half part thereof; and third, to ascertain the value of the property so purchased by the plaintiff which was in the possession or control of the defendant, at the time of filing this bill, and which he refused to deliver up to the receiver appointed by the Circuit Court, and which inquiry will include the hogs, horses, and other like property the said defendant may have disposed of to others without accounting for the same to the plaintiff; and for which sums, when ascertained, a decree shall pass in favor of the plaintiff, together with the costs of this suit.

We have not deemed it necessary to make any remarks upon the claim set up by the defendant that a portion of this stock was purchased with a view to stocking the "Claywell farm," as it is called, inasmuch as all the testimony goes to show that agreement was never consummated by the intended parties to it. That agreement having failed, the stock could not be re-

tained by the defendant on that pretext, and he is bound to account to the plaintiff for them as his original property.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to the Circuit Court to proceed in the cause in conformity to this opinion.

Decree reversed.

Wentworth's Lindley, 5; Bond *v.* Pittard, 3 M. & W. 357; Walden *v.* Sherburne, 15 John. 409; Gilpin *v.* Enderbey, 5 B. & Ald. 954, 7 Eng. Com. Law, 314.

(*e.*) Participation in Gross Receipts.

BLUE *v.* LEATHERS.

Supreme Court of Illinois, 1853.

15 Ill. 32.

SCATES, J. By consent the parties employed a third person to state their accounts and strike a balance between them; both parties rendered their accounts accordingly, and the balance was ascertained and announced to the parties, without exception to it by either, or any express promise to pay by Blue, against whom a balance of $87.97 was found. Before separating, they agreed that a small item of some four or five dollars had been overlooked, and Leathers agreed to adjust it when the balance was paid.

This settlement was proven upon the trial, and at the instance of Leathers the Court instructed the jury that an action would lie upon it, without an express promise to pay the amount found by it. To this instruction objection is made here, on the ground that the evidence established a partnership between the parties in the matters of account taken into that settlement, and therefore an express promise to pay the balance was necessary, to sustain an action at law. This Court has so decided in Chadsey *v.* Harrison, 11 Ill. R. 156, and in Davenport *v.* Gear *et al.*, 2 Scam. R. 498; and also in New York, Casey *v.* Brush, 2 Caines R. 295; Westerlo *v.* Evertson, 1

Wend. R. 533. An express promise is necessary to sustain an action at law, for such a partnership balance. But this rule has no application to this case; the question as to the existence of a partnership was submitted to the jury, among others, and from a general verdict for plaintiff, we may infer that they found for the plaintiff on this ground also, unless misled by the instruction of the Court, as applicable to partnerships. But even in this point of view it would be erroneous only as an abstract proposition, for the testimony very clearly shows there was no partnership. There was a joint interest only. Blue agreed to furnish his farm and a certain amount of teams and labor. Leathers was to labor and manage the tillage, and the parties were to divide the crop in the proportion of two-thirds to Blue, and one-third to Leathers. This does not constitute a partnership, although it is a joint enterprise.

Here is no trading, no risks, no contingent profits, but simply an agreement for joint tillage, and a division of the produce of the farm in kind. Instead of making this division in kind, Blue, by the request of Leathers, sold Leathers's part of this crop along with his own. The settlement between the parties included a division of the purchase-money, and items of expense in the tillage, harvesting, and marketing the crop, together it may be with other matters not embraced within the contract. The parties did not go into proofs upon the trial, as to all the items embraced in this settlement, and we are therefore unable to say that the computation of the jury is erroneous and contrary to the evidence. The witness who bought the crop and made the settlement states the balance found and the amount he paid on the crop at that time, but does not state that it was for the whole or only a part, or whether he paid any part before. The items and their respective amounts are not given us. At the time he made the settlement he paid $150, one-third of which would make Leathers's part only $50; yet the balance amounted to $87.97; showing the necessity of introducing full proof, to enable us to recompute the account in order to detect an error in the computation of the jury. There were some few items in proof before the jury not in-

cluded in that account, and which doubtless, reduced the verdict below the amount of the settlement; but we are unable from the proofs in the record to determine that there was error in the record.

Judgment affirmed, with costs.

Judgment affirmed.

Wentworth's Lindley, 18; Sargent *v.* Downey, 45 Wis. 498; Gilman *v.* Cunningham, 42 Me. 98; Carter *v.* Bailey, 64 Me. 458; Eastman *v.* Clark, 53 N. H. 276; Donnell *v.* Harshe, 67 Mo. 170; Austin *v.* Thomson, 45 N. H. 113; Smith *v.* Summerlin, 48 Ga. 425; Hurley *v.* Walton, 63 Ill. 260.

5. INCOMPLETE PARTNERSHIPS.

Hobart *v.* Ballard.

Supreme Court of Iowa, 1871.

31 Ia. 521.

Day, C. J. Upon the trial, from the evidence presented the Court found certain facts, which are fully sustained by the evidence, and are made the basis of this opinion. These facts are as follows:

1st. "On the 8th day of August, 1870, the plaintiff and defendant entered into a contract by which the plaintiff agreed to purchase of the defendant the one-half of the printing establishment in question for the sum of $2,000—$1,500 in cash, and the balance by note, executed by the wife of plaintiff herein."

2d. "The purchase was to be in the name of plaintiff's wife. This was afterward abandoned, and it was agreed that plaintiff was to be nominal as well as real purchaser and partner, and that a less sum than $1,500 should be paid in cash and a credit to January 1, 1871, given for the residue."

3d. "The plaintiff paid to the defendant on this contract, as modified, the sum of $1,295."

4th. "It was contemplated by the parties, in the first instance, that the contract should be fully performed by payment of the money, and the giving of the note within a short time.

But it does not seem, from all the testimony, as well as the acts of the parties, that plaintiff was to share in the profits, or to be an acting partner, until that money should be paid and the note given, or until final payment, as the contract was modified. However, the testimony has not particularly to this point been directed; and, as it may be a question on the final hearing, I do not here determine it."

5th. "The defendant, before the 1st day of January, 1871, and before the filing of this petition, refused to permit plaintiff to continue in the office as an assistant editor."

6th. "On the 31st day of December, 1870, the defendant offered in writing to repay plaintiff the $1,295, which the plaintiff agreed to receive, but it was not paid."

From the facts found we are of opinion that the receiver should not have been appointed. To entitle the plaintiff to the appointment of a receiver, it must appear that there was a partnership *completed*, so far as to entitle him to a participation in the profits. It is this right to a participation in the profits, and the danger that one partner might not, during the pendency of an action for dissolution, honestly and fairly account to his copartner for the same which constitutes the principal reason for the appointment of a receiver.

Upon the plaintiff is the burden of establishing the existence of a partnership at the time the application was made for the appointment of a receiver.

This he has failed to do. The Court below found, as a fact, that "*it does not seem from all the testimony, as well as the acts of the parties, that plaintiff was to share in the profits, or to be an acting partner until the money should be paid and the note given, or until final payment, as the contract was modified.*" Having failed, then, to show an existing partnership, or a present right to participation in the profits, his application for the appointment of a receiver should have been denied.

As the plaintiff has paid a large sum of money upon the purchase, part, of the press and other material of the estabment, and is thus equitably entitled to have his claim satisfied out of said property, the injunction restraining the sale or in-

cumbrance of the same should be continued until his demand is discharged.

The judgment of the District Court is reversed, and the cause remanded for further proceedings in harmony with this opinion.

Reversed.

Wentworth's Lindley, 19–25; Reboul *v.* Chalker, 27 Conn. 114; Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230; Snodgrass *v.* Reynolds, 79 Ala. 452; Wilson *v.* Campbell, 10 Ill. 383; Baldwin *v.* Burrows, 47 N. Y. 199.

6. ILLEGAL PARTNERSHIPS.

READ *v.* SMITH.

Supreme Court of Texas, 1883.

60 Tex. 379.

STAYTON, Associate Justice. The petition in effect alleged that about October 1, 1876, the appellee entered into a verbal agreement of partnership with the firm of H. A. Wood & Co., the object and purpose of which was to deal in county scrip of Washington County, each party to furnish an equal amount of capital and divide the profits. It further alleged that in pursuance of that agreement the appellee paid to Wood & Co. $1,600, which was invested in county scrip of Washington County, and for the value of one-half of the county scrip bought by the partnership, and undisposed of on the 3d of October, 1876, a recovery was sought.

At the date of the alleged agreement H. A. Wood had a partner, but that partnership was dissolved, and the fact that it ever existed, and as to whether or not it had any connection with the matter between Smith and Wood, is of no importance in this case.

Wood died testate, and the appellant is the executor of his will. A claim was presented to him for allowance, which, after allowing some credit, amounted to $1,289.05, which was rejected.

Among other defenses, the appellant answered that the contract, if any existed, between Wood and Smith was illegal and void, in that, at the time the agreement was made, Smith was the sheriff and *ex officio* tax collector of Washington County, and forbidden by law to deal in county scrip.

The answer further alleged that if any money was paid by Smith as and for the purpose alleged, that the same was so paid while he was sheriff, and that if any county scrip was bought with any money furnished by Smith, or any scrip received from him, the same was bought or received while Smith was sheriff and *ex officio* tax collector.

The answer also denied that there had ever been any settlement between Wood and Smith, or between Smith and Wood's representative, or that there had been any promise by Wood or his representative to pay to Smith any sum of money, and that if any profit had accrued from the sale of scrip that the same was derived from an illegal contract, which the Court, it was claimed, had no power to enforce. A demurrer was sustained to this part of the answer, and this is assigned as error.

If Wood and Smith made an agrreement, while Smith was the sheriff of Washington County and *ex officio* tax collector, to buy and deal in the county scrip of that county for the mutual benefit of both parties, the contract was certainly illegal; for the statutes then in force made it a criminal act for any officer of a county to become directly or indirectly interested in the paper of such county, and this prohibition continued after an officer had gone out of office until he made a final settlement of his official accounts.

The statute bearing upon this subject is as follows: "Any officer of any county in this State, or of any city or town therein, who shall contract, directly or indirectly, or become in any way interested in any contract, for the purchase of any draft or order on the treasurer of such county, city, or town, or for any jury certificate, or any other debt, claim, or demand for which said county, city, or town may or can in any event be made liable, shall be punished by fine of not less than ten

nor more than twenty times the amount of the order, draft, jury certificate, debt, claim, or liability so purchased or contracted for:" Penal Code, 248.

"Within the term 'officer,' as used in the preceding article, are included ex-officers until they have made a final settlement of their official accounts:" Penal Code, 249.

These provisions of the statute are broad, and embrace every county officer, and every character of debt or claim against a county.

By entering into such an agreement as is alleged in the petition and explained in the answer, to which the demurrer was sustained, it cannot be denied, if that answer be true, that Smith, while an officer of Washington County, made a contract to become, and did become, directly and indirectly, interested as owner, in paper evidencing the debt of the county, and this in violation of the criminal law of the land, and that the county scrip for the value of which this suit is brought was acquired under that illegal agreement.

The general rule is, that Courts of justice will not lend their aid to one who bases his claim for relief upon his own illegal act or agreement: Holman *v.* Johnson, 1 Cowper, 343.

This rule is founded upon broad and wholesome grounds of public policy, and a different rule would lead to the encouragement of violations of the law; for if relief could be given in such cases, the criminal would balance the profits to be made out of the prohibited contract against the penalty, and if the former preponderated he could and would commit crime without any other loss than a diminution of profits, if detected and convicted. There is no ground upon which a contract to violate a criminal law, and thereby defeat its purpose, can be sustained.

In this case the plaintiff makes the contract between himself and Wood, and the payment of the money under it, the sole basis and measure of his claim for the value of one-half of the county paper purchased under it. Without the agreement he shows no title whatever to the scrip.

The answer sets up the facts which make the agreement

alleged and relied upon by the plaintiff illegal, but this does not affect the question. The question, however presented, still remains: What was the purpose of the agreement upon which the plaintiff relies? The answer alleges the facts which show its illegality, and invokes an inquiry as to the truthfulness of its averments, but it in no way relieves the plaintiff from his reliance upon the agreement as the foundation of his action: Sampson *v.* Shaw, 101 Mass. 152; Hanauer *v.* Woodruff, 15 Wall. 439.

It has been often said that the test whether a cause of action connected with an illegal transaction can be enforced at law is whether the plaintiff requires any aid from the illegal transaction to maintain his case. While this is a correct rule, it may not go far enough to meet all the cases which may arise, upon which, under well-settled principles, the Courts would refuse relief upon the ground of the illegality of the transaction: Hanauer *v.* Woodruff, 15 Wall. 439. This rule, however, goes far enough to include this case. The plaintiff claims the value of one-half of the scrip. Why? Because while sheriff he made the agreement set out, and, in pursuance therewith, furnished the money with which the paper was bought. Thus is he compelled to set out the agreement, illegal as it is shown to be by the answer, as the sole basis of his right.

The object and purpose of the contemplated partnership was to do indirectly through Wood, for the benefit of both, that which the law prohibited Smith to do directly, and it had no single purpose legal in its character.

In such a case as is made by the pleadings we believe that the law forbids relief to either party in the way of forcing an account and settlement between them, they never having made a settlement themselves: Riley *v.* Jordan, 122 Mass. 233; Todd *v.* Rafferty's Adm'rs, 30 N. J. Eq. 260; Watson *v.* Murray, 26 N. J. Eq. 263; Snell *v.* Dwight, 15–19; Anderson *v.* Powell, 44 Iowa, 22; Bartle *v.* Coleman, 4 Pet. 187; Woodworth *v.* Bennett, 43 N. Y. 274; Blythe *v.* Lovinggood, 2 Iredell's Law, 22; Howell *v.* Fountain, 3 Kelly, 177; Fletcher *v.* Watson, 7 Gratt. 13; Wills *v.* Abbey, 27 Tex. 203; Shelton *v.*

Marshall 16 Tex. 360; Seidenbonder *v.* Charles, 4 S. & R. 160–173.

The fact that Wood may have given a receipt evidencing the transaction does not alter the rule. We are referred to the case of De Leon *v.* Trevino, 49 Tex. 91, among others, in support of the ruling of the Court in sustaining the demurrer to the answer.

In that case it was not conceded that the original transaction, out of which the debt for which the notes sued upon were given, was illegal, and the decision is based upon the fact that the parties had voluntarily settled all matters between them immediately connected with the original transaction claimed to have been illegal.

That this is so is evidenced by the concluding paragraphs of the opinion having reference to the contracts sued upon: "That they are collateral to, and not a part of, the illegal contract, which had been, by voluntary settlement, fully completed and ended before the contract or undertaking upon which the suit is brought was entered into. Such contracts are, therefore, regarded by the Courts as standing upon an altogether different footing from a renewal of, or a new security given for, an original illegal contract."

The facts of the case now under consideration do not bring it within the line of that decision and those cited in the opinion in that case; hence there is no necessity, if it be admitted that the original transactions between De Leon and Trevino were illegal, in this case to review the opinion in that case.

The opinion in that case, however, recognizes the correctness of the conclusions to which we come in this case. In the course of the opinion in that case it is said: "If the notes sued upon had been given to carry on the illegal enterprise, instead of in settlement of it, the taint of the contract would have attached to the notes, and appellees could not maintain an action upon them. But the answer merely shows that, by reason of the illegal character of the enterprise in which the parties had been engaged, appellant's intestate could not have

been forced to an accounting with appellees, or to pay or give his notes for the amount found to be due from him to appellees on such accounting."

The other assignments of error need not be considered, as they present matters not likely to arise on another trial.

For the error of the Court in sustaining the demurrer to the defendant's answer the judgment is reversed and the cause remanded.

Reversed and remanded.

Wentworth's Lindley, Bk. 1, Chap. 5; McGunn *v.* Hanlin, 29 Mich. 476; Brown *v.* Richardson, 133 Mass. 293; Forsyth *v.* Woods, 11 Wall. 484; Watson *v.* Murray, 23 N. J. Eq. 257; Gould *v.* Kendall, 15 Neb. 549; Craft *v.* McConoughy, 79 Ill. 346.

WOODWORTH *v.* BENNETT.

Supreme Court of New York, 1871.

43 N. Y. 273.

CHURCH, C. J.—The point in this case is, whether the Court below erred in allowing to the defendant the sum of $100 as an offset. The facts are substantially as follows: The plaintiff, defendant, Stephens and Truesdell, made an agreement in the nature of a copartnership, to propose or bid for public work on the Seneca River improvement. The bid was to be put in in the name of the plaintiff alone, the defendant and Stephens to become sureties. Truesdell was at the time an engineer in the employ of the State on the canals. The bid was made in the name of the plaintiff, in accordance with the arrangement. Before the work was awarded, the said parties made an agreement with one Haroun, to withdraw their claim to the work, and sell their bid to him for $400 (he being a higher bidder for the same work), which was consummated, and he gave his note for the amount. It was then arranged that the note should be left with the plaintiff for collection, and that when collected each of said persons should be entitled to $100. The plaintiff collected

the note, paid to Stephens and Truesdell each $100, and promised to pay the defendant, and apply it on their deal, but never did. It is claimed that it cannot be allowed, on account of the illegality of the transaction out of which it arose. To enable the Court to apply correct legal principles, it is necessary to analyze the transaction and ascertain its true nature and character.

The original arrangement for a joint interest or copartnership was illegal, and contrary to a positive statute in two respects. The laws of 1854, chapter 329, in substance requires that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named shall become interested in any contract that may be made, and engineers, and all other persons in the employ of the State on the canals, are also prohibited from becoming interested in any contract or job on the public works.

In the next place, the transaction with Haroun was contrary to public policy, and illegal. It is manifest that the object and purpose of the purchase of the bid was to have it withdrawn so as to enable Haroun to take the contract upon a higher bid. This was directly against the interests of the State, and tended to destroy that honest competition which public bidding is designed to secure; and when, as in this case, it was done partly for the benefit of an officer of the State, whose duty it was to protect its interests, it was not only contrary to public policy, but was grossly corrupt.

The Supreme Court placed its decision in favor of the defendant, upon the ground that as between these parties, the illegal contract had been fully executed when Haroun paid the money, and that the plaintiff then became a mere depositary, and held the money for the use of the other parties.

It is undoubtedly true that, if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test, that whether a demand

connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case: Chitty on Con. 657. So it has been settled that a party who pays money to a third person for the use of another, which, on account of the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality: Tenant *v.* Elliott, 1 Bos. & Pull. 3; Merritt *v.* Millard, 4 Keyes, 208. This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive.

If the only illegal transaction was the contract with Haroun for the sale of the bid, these principles might be applicable, and would probably constitute a good answer to the objection to this counter claim. The payment of the money by Haroun completed that contract, and nothing remained unexecuted. But here the original partnership was illegal; not because of its purposes and objects, but its compositiou was prohibited by law. If a lawful firm should receive funds from an illegal traffic or business, it may be that the illegality would be regarded at an end, and a division of the money enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried: 2 Wal. 70.

In such a case the obligation to divide would not arise out of the illegal purposes of the firm, nor would the division carry out any of those purposes, but the obligation would arise out of the contract of partnership itself. Here this contract was illegal. The object of the statute was to enable the State officers to know with whom they contracted, and also to see that the statute, prohibiting engineers and other canal officers from becoming interested, was not violated, and to prevent all secret combinations in relation to obtaining work.

The money obtained by this bid belongs to the firm; and the plaintiff could have been compelled to divide, if the firm had been lawful, by force of the contract organizing it. In this case he also agreed to pay the money, and defendant asks the Court to compel him to perform this obligation. The answer to it is obvious. There is no obligation, because it was incurred contrary to law. It rests upon the contract of partnership, and that is void for illegality.

In law there was no partnership, and none of the parties obtained any rights under the contract creating it: Armstrong *v.* Lewis, 3 Mylne & Keen, 45.

The sentiment of "honor among thieves" cannot be enforced in courts of justice. Suppose the engineer had sued for his share after an express promise, would any Court have tolerated his claim for a moment in the face of a statute prohibiting him from being interested? If not, in what respect does the defendant occupy any better position? The first step in his case is to prove that he was a secret partner and entitled to a share of this money. The law prohibits secret partners, and he is, therefore, not a partner.

The express promise does not aid the defendant, because the promise was only to carry out the unexecuted provision of the contract of partnership to divide the money. The two cases cited by the counsel for the defendant, if they are to be regarded as good law, are distinguishable from this. In the case of Faikney *v.* Renois, 4 Burr, 2069, one of two partners had paid £3,000 to settle differences in illegal stock-jobbing operations, and the defendant executed his bond to secure the share of the other partner. The Court overruled the defense recognizing the exploded distinction between acts *malum prohibitum* and *malum in se*, and held that as between those parties the bond was to secure the plaintiff for money paid, and the purposes of the payment would not be inquired into. A similar decision was made upon the authority of this case in Petrie *v.* Hannay, 3 Term, 418, Lord KENYON dissenting. The distinction between the above cases and this is in the circumstance that there the illegal transactions had been

closed up and settled, and the obligations sought to be enforced were for the money advanced for that purpose. Here it is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length, and the two cases above cited have been very much shaken by subsequent decisions, and are, to say the least, questionable authority, especially the latter: Aubert *v.* Maze, 2 Boss. & Pull. 370; Mitchell *v.* Cockburne, 2 H. Blackstone R. 380; *Ex parte* Daniels, 14 Ves. 190; Lowry *v.* Bourdieu, Douglas R. 467; Brown *v.* Turner, 7 Term, 626; Belden *v.* Pitkin, 2 Caines R. 147, note *a*.

The general rule on this subject is laid down in this Court, in Gray *v.* Hook, 4 Comst. R. 449, by MULLETT, J., as follows: "The distinction between a void and a valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

It is sometimes difficult to apply general rules to particular cases, but this case comes clearly within the first class mentioned in the above rule. It is not from any regard to the rights of the party setting up this defense that Courts refuse to enforce illegal contracts, but it is for the protection of the public. The plaintiff in this case is entitled to no sympathy or favorable consideration. He must have made an affidavit that no other person was interested with him in the proposal, and when he received this money, as between him and the defendant, the latter was entitled to it; and while we have no disposition to justify his conduct, his position enables him to secure the advantage of a decision which we are compelled to make in obedience to a principle of public policy which is

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indispensable for the protection of the community against the corrupting influences of illegal transactions.

The observation of Lord MANSFIELD in Holman *v.* Johnson, 1 Cowper, 343, is applicable here. He said: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant (in this case the plaintiff). It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say."

Judgment must be reversed and a new trial ordered, costs to abide the event.

All the Judges concurring.

Judgment reversed and a new trial ordered.

Gould *v.* Kendall, 15 Neb. 549; Bowen *v.* Richardson, 133 Mass. 293; Durant *v.* Rhener, 26 Minn. 362.

A part of the business being legal and a part not, the Court, in an action to wind up, may take charge and settle that part of the business which is legal, but not the illegal part: Anderson *v.* Powell, 44 Ia. 20.

7. JOINT STOCK COMPANIES.

TENNEY, BALLISTER & CO. *v.* NEW ENGLAND PROTECTIVE UNION, DIV. No. 172.

Supreme Court of Vermont, 1864.

37 Vt. 64.

ASSUMPSIT on four promissory notes, and for goods sold. One of the defendants pleaded in abatement, to which the plaintiffs replied. All the other defendants upon whom service was made pleaded *non assumpsit.*

Trial by the Court, by consent of parties, December Term, 1863, BARRETT, J., presiding.

It was proved that in 1850 the defendants formed an association under the style of the New England Protective Union, Division No. 172, for the purpose of doing ordinary mercan-

tile business, in the village of South Londonderry, and adopted a constitution and by-laws, and did business down to about the 1st of February, 1861, at which time said company failed, and all the property belonging to it was attached by its creditors, whereupon the business ceased and has not been resumed.

Winfield Wright, one of the defendants, was appointed agent of the company in May, 1857, whose business as such agent was to take charge of the store and do the buying and selling of the goods, and make and receive payment therefor, and he continued to be such agent and do the business thereof down to the time of said failure. From 1858 to the time said notes were given the company purchased the goods for which the notes were given, by said agent, of the plaintiffs, and one bill of goods after that, viz., on the 30th day of January, 1861, amounting to $92.54.

Sem Pierce, one of the defendants named in the plea in abatement, resided, at the time the association was formed, in Londonderry, and continued to reside there till July, 1859, when he removed to Plymouth, and resided there at the time this suit was brought.

Pierce was one of the original members of the association, and took an active part in its formation and organization. He paid in the $10 provided by the amendment of the fourteenth article of the by-laws, made the 14th of August, 1852. As a member of the association and as director he participated in its business, and continued to purchase goods at the store down to the time of his removal to Plymouth, but not afterward. For goods purchased by him a balance of account had accrued against him of some over $30, in May, 1859. About this time he paid $13 on his account. After he had sold his farm, in 1859, he told Howard, one of the directors, that he had sold his farm and was going out of town; that he supposed he was owing the concern some $30 or more, and that he could pay that up into about $10. A day or two before he removed, as he was passing the store, he called the agent Wright to the door, and handed him $10, saying that

just about squared him out. Pierce's understanding was, that under the fourteenth article of the by-laws and the amendment, he was entitled to goods to the amount of his subscription any time on demand, and if he left and did not take the goods they would balance an equal amount of what he was owing. He never settled his account with the company, and it stands now just as he left it upon the payment of the $13 and $10, which were credited to him on his account on the books of the company. He never said anything to the agent about withdrawing from the association, nor did he ever publish, or give to the plaintiffs any notice, nor had they any notice of his withdrawing from the company. He supposed, himself, that he was out of the concern.

The business of the association was under the control and supervision of the directors, and so continued to be down to the time it ceased. There was never any published dissolution of the association, nor any action taken by it for the purpose of dissolving it.

Russell Aldrich, a member of the association, died October 18, 1860. The Court found from the constitution, by-laws, records, etc., that the association was designed to be continuing and to have perpetuity, and not to be dissolved, or its continued existence as a partnership to be affected by the death or withdrawal of any member. It was argued and claimed on both sides that said association was a copartnership. The plaintiffs gave in evidence the notes described in the declaration. No question was made as to their due execution, or as to the authority of Wright to give them, as agent of the association, or as to their validity as binding the association.

The defendants claimed: 1st, That by reason of Pierce leaving Londonderry and removing to Plymouth he ceased to be a member of the company, and so was improperly made a defendant in this suit. 2d, That by the decease of Aldrich the partnership became dissolved, and that as Pierce had nothing to do with the matter at and after that time he could not be held as a partner after that time, and so was improperly made a defendant in this suit. Upon the facts detailed the Court

declined to sustain either proposition, and found the issue under the plea in abatement, and under the plea of *non assumpsit,* for the plaintiffs, and rendered judgment for the sum due on the notes, and on said account of January 30, 1861—to which the defendants excepted.

KELLOGG, J. No copy of the plea in abatement, or of the defendants' constitution, by-laws, and records having been furnished to us, we must assume that, in the judgment of counsel, the references to these papers in the briefs are sufficient for the purpose of the hearing in this Court. We are informed by the briefs that the plea in abatement and the defense to the action both rest on the alleged fact that the defendant Pierce had ceased to be a member of the partnership of the defendants before the debts which are the subject of the suit were contracted.

From the facts found by the County Court it appears that these debts were contracted between May, 1858, and February, 1861, and that Pierce was one of the original members of the partnership, or division, at the time of its organization in 1850, and, from that time up to the time of his removal from Londonderry to Plymouth, in July, 1859, he appears to have been an active director and leading manager of the division. The defendants' division or partnership commenced making purchases of goods from the plaintiffs as early as May, 1858—a year or more previous to the time when, as is claimed, Pierce ceased to be a member of the division. The natural presumption arising from the fact that the plaintiffs gave credit to the division is that the credit was given in reliance upon the liability of the members of the division at that time, and that the plaintiffs knew who were the members of the division to which they were giving credit. Nothing appears in the case tending to establish a contrary conclusion.

Did Pierce cease to be a member of the division as between himself and the other members? His removal from the town could not affect the question, unless there was some provision in the constitution or by-laws of the division which made

residence in the town a condition of membership. It is not claimed that there was any such provision in this case. Neither would his supposition that he had ceased to be a member of the division affect the question, unless there was some act on his part which justified that supposition. It distinctly appears that he did not at any time say anything to the agent of the division about withdrawing from it, and it does not appear that he gave any information to any other officer or member of the division of his purpose or desire to withdraw from it. We find no ground on which it can be claimed that, as between himself and the other members, he ceased to be a member of the division. It is clear that he did not relieve himself from the liability by ceasing to participate in the management of its business.

But even if, as between him and the other members, he had ceased to be a member of the division, still, as he was a member when the dealings between the plaintiffs and the division began, the plaintiffs were entitled to treat him as a member until they were notified that he had withdrawn from the division, unless it appeared that, when they gave credit to the division, they did not know that he was a member of it. No such notice is claimed to have been given by Pierce to the plaintiffs. His liability to the plaintiffs would continue the same as that of any other member of the division until this notice was given. This is a settled principle of the law of partnership.

It is claimed that the defendants' partnership was dissolved in October, 1860, by the death of Russell Aldrich, one of its members, and that the surviving members cannot be held responsible for the dealings had with the plaintiffs after that time without their assent or knowledge, although had in the name of the division and by its managing agent, and in the same way that the previous dealings had been had. It is not necessary to pass upon the question whether this division or association was in strictness a partnership or not, inasmuch as both parties claimed that it was a partnership. It was found by the County Court that the association was designed to be

continuing and to have perpetuity, and not to be dissolved, or its continued existence as a partnership to be affected by the death or withdrawal of any member. The death of Aldrich would not, therefore, work a dissolution of the partnership any more than would the withdrawal of any other member from it. Neither the death nor the withdrawal of a member would affect the liability of those who continued to be members for debts contracted in the name and for the benefit of the association.

We find no ground for the conclusion that Pierce was improperly made a defendant in this suit, and the judgment of the County Court in favor of the plaintiffs is accordingly affirmed.

Wentworth's Lindley, 49; Butterfield *v.* Beardsley, 28 Mich. 412; Phillips *v.* Blatchford, 137 Mass. 510; Kingman *v.* Spurr, 7 Pick. 235; First National Bank *v.* Goff, 31 Wis. 77; Machinists' National Bank *v.* Dean, 124 Mass. 81; Tyrrell *v.* Washburn, 6 Allen, 466.

8. A PARTNER'S INTEREST.

STAATS *v.* BRISTOW.

Supreme Court of New York, 1878.

73 N. Y. 264.

FOLGER, J. The defendant had the possession of certain personal property, to which the plaintiff claims that he was entitled. It was, of course, incumbent upon the plaintiff to show and establish his title. He showed that he was the purchaser at a sheriff's sale. The certificate given by the sheriff does not say that the plaintiff bought the property itself; it says that he bought, only, all the right, title, and interest which Joseph Stockbridge had in it on the 30th November, 1874. The sheriff's return on the execution upon which he sold is the same. The execution on which the sale took place directed a sale of the property of the defendants therein named, who were the Stockbridge above named, and his copartner, Martin; but the property pointed at was what

they owned, or either of them owned, on a day named, to wit: on the 9th December, 1874; and before that day, to wit: on the fourth day of that month, the defendants in the execution had assigned the property to the defendant in this action in trust for all of their creditors.

So it is apparent that the plaintiff did not buy the property itself, specifically; but only the interest, right, and title which Stockbridge had in it. Now the interest which he had in it was that of one of two partners; as the property was part of the assets of a copartnership firm of which he was a member. The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the copartnership, in the surplus of those assets remaining after all partnership debts are fully paid. It appears in this case that the firm was insolvent; that its debts much exceeded its assets; that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property was nothing; and so the plaintiff got nothing for his purchase.

The force of these views is resisted by the plaintiff thus: It is claimed, and rightly, that one partner may sell and transfer the entirety of any particular personal effects and property of the partnership for purposes within the scope of the business, and can make sale to a creditor of the firm in payment of a debt due, without the knowledge or consent of another partner, though the firm be insolvent and thereby a preference be given to the creditor vendee. Then, it is claimed that the law may do whatever one partner can do. Let it be granted that it may, for this occasion, though we do not concede it as a universal principle. The law has not in this case undertaken to do that. The attachment, under which it is claimed that the first step was taken toward doing that was not against this property specifically, nor was it against the property of the firm. It was against the property of Stockbridge. What was the property of Stockbridge? It was what he owned in individual right, and it was his interest in the property of his partnership. What that interest was has already been shown. So that the law did not undertake

to do, nor has it done, more than to sell for the benefit of a firm creditor, the property of Stockbridge. We speak now of what was done by virtue of the attachment alone. The action was against both partners, and both were brought into court. But if both had not been brought into court, and judgment had been got, and execution issued directed to be levied upon the sole property of the one served, and upon the joint property of both, the law would have undertaken to do what we admit one partner can do ; and if this joint property had been levied upon before the assignment to defendant, and had been sold to the plaintiffs in the execution, or to one of them, and the avails paid over, the law would have succeeded in doing just what one partner could have done. The law must seek the end desired by the legal path, just as the single partner must. That path was not by an attachment against the property of one partner who, by his personal situation, was obnoxious to that process. That could issue, but not against joint property; only against individual property; and individual property was only the interest in a surplus.

These views do not conflict with Van Brunt *v.* Applegate, 44 N. Y. 544, on which the appellant much relies, and we do not express any opinion upon what was there held.

The judgment appealed from should be affirmed.

Trowbridge *v.* Cross, 117 Ill. 109; Menagh *v.* Whitwell, 52 N. Y. 146; Bank *v.* R. R. Co., 11 Wall. 624; Filley *v.* Phelps, 18 Conn. 294; Hiscock *v.* Phelps, 49 N. Y. 97; Douglas *v.* Winslow, 20 Me. 89.

9. A FIRM NOT AN ENTITY.

GILLE *v.* HUNT.

Supreme Court of Minnesota, 1886.

35 Minn. 357.

GILFILLAN, C. J. Action under the statute to determine adverse claims to real estate, each party claiming the title. July 25, 1856, Jared S. Demmon owned the premises, and on that day executed a mortgage thereon to " D. B. Dorman &

Co," containing the usual power of sale, and which was, on the same day, duly recorded. October 7, 1856, Demmon conveyed the premises to Peter Poncin, by deed duly recorded the next day. On the same day, evidently either at the same time of or after the execution of this last deed, D. B. Dorman executed to Poncin a deed of quitclaim and release of the premises, which was recorded October 8, 1856. Plaintiff claims under Poncin. "D. B. Dorman & Co." was a partnership under that name, composed of D. B. Dorman and Ovid Pinney, though that fact does not appear to have been stated in the mortgage. April 15, 1857, Dorman executed to Pinney an assignment of the mortgage, recorded September 13, 1859. In May, 1864, Pinney proceeded to foreclose the mortgage under the power of sale, signing his name to the notice of sale, "Ovid Pinney, Mortgagee and Assignee." At the sale he became the purchaser, and received from the sheriff the usual certificate. The defendants claim under the mortgage and foreclosure.

The case turns mainly on the question, in whom was the legal title to the mortgage—that is, who was in law the mortgagee? Was it D. B. Dorman, or was it the partnership or the parties doing business under the name "D. B. Dorman & Co."? A mortgage of real estate, though it is in effect but a lien or security, is in form a conveyance of an estate or interest in land: Morrison *v.* Mendenhall, 18 Minn. 212, 232, and must be governed by the same rules as to its execution and validity, and the capacity of the parties, and their proper designation, as are applied to a conveyance. It has been affirmed in several cases in this Court that the legal title to real estate can be held only by a person, or a corporate entity which is deemed such in law; and that, therefore, a partnership cannot, as such, take and hold such legal title. Thus, in German Land Ass'n *v.* Scholler, 10 Minn. 260, 331, it was decided that the plaintiff, being only a voluntary association of persons, unincorporated, had no legal capacity to take or hold real property. The rule was recognized in Morrison *v.* Mendenhall, and in Tidd *v.* Rines, 26 Minn. 201, 2 N. W.

Rep. 497, it was decided that a conveyance to a partnership by its firm name did not vest in it any legal title or estate, because a partnership, as such, is not recognized in law as a person; so that even had it been stated in the mortgage that the name inserted as the mortgagee was that of a partnership, it would not have made the partnership mortgagee. Nor, as we think, would the individual partners (other than the one named) be the mortgagee.

It is true that the grantee in a conveyance need not be named, provided he be described with sufficient definiteness and certainty as where he is indicated by a title, or an office, and there is but one such; as in Lady Superior *v.* McNamara, 3 Barb. Ch. 375, 46 Am. Dec. 184, where a conveyance to "The Lady Superior" of a designated convent was held good to vest the title in a person then lady superior; but the Court referred with approval to Duncan *v.* Beard, 2 Nott & McCord, 400, in which it was held that a conveyance to one and his "associates" vested title in none but the person named, the term "associates" being too indefinite to carry the title to the persons intended by it. There are some authorities which seem to hold that such a conveyance would be good to the persons so designated, and that it may be proved by parol who they are; but we think these cases go a great way toward holding that a conveyance of real estate may rest partly in parol; and when we consider the indefinite confusion in titles to real estate—in which there ought to be great definiteness and certainty—such a rule might let in, we do not hesitate to decide that the proposition that such a designation is too indefinite and uncertain rests in better reason and authority. Where the style of a partnership is inserted as grantee, and it contains the name or names of one or more of the partners, there is no reason why the title should not vest in the partners so named; and the authorities are to the effect that it would.

The legal title to the mortgage in question was, then, in D. B. Dorman. He was the only person through whom legal title could be made under the mortgage.

We have not considered, because it is not necessary, how

the mortgage would have stood in equity, as in an action to foreclose it; nor how indefiniteness in designating a grantee or mortgagee may be affected by the registry laws.

Although a mortgagee has not such an estate in the land as will pass by a deed of conveyance, and although a quitclaim deed by the mortgagee will not, unless it appears to have been so intended, operate as an assignment of the mortgage interest, it will operate, where made to one having an estate in the land, as a release. Such, at common law, was the office and effect of a deed of quitclaim and release, and such is the effect which we must presume the parties intended the deed from Dorman to Poncin to have. The mortgage having been released, the foreclosure proceedings were of no effect.

Judgment affirmed.

Wentworth's Lindley, 110 *et seq.*; Reed *v.* Hanover Branch R. R., 105 Mass. 303; Tidd *v.* Rines, 26 Minn. 201; Morrison *v.* Mendenhall, 18 Minn. 232; Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577.

NOTE.—The tendency of legislation and the decisions is in the direction of recognizing the character of a firm as an entity.

Statutes permit copartnerships to sue and be sued by the firm name. Property of a copartnership is assessed as that of the firm instead of as that of the individual members. Decisions permit chattel mortgages executed by a partnership to be filed at the place of its principal business: Minn. Stat., '78, chap. 66, § 42; Hubbardston Lumber Co. *v.* Bates, 35 Mich. 254.

B. POWERS, RIGHTS, DUTIES, AND LIABILITIES ARISING OUT OF THE RELATION.

1. PARTNERSHIP ARTICLES.

THE contract of partnership is expressed in the Articles of Copartnership, which determine the powers, rights, duties, and liabilities of the members. The contract may be oral except in such cases as the statute of frauds require it to be in writing.

COLEMAN *v.* EYRE.

Supreme Court of New York, 1871.

45 N. Y. 38.

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done or contributed anything to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defend-

ant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be applied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterward, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that, in consideration of the agreement by the plaintiffs to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intendment is, that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other: Briggs *v.* Tillotson, 8 Johns. 304.

The evidence was conflicting as to whether the defendant was to share in the commissions. The referee found in the plaintiffs' favor on that point, and the Court below, at General Term, refused to interfere with that finding. We cannot disturb it.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one

party undertook to bear one part of a possible loss, in consideration of a share of an expected profit.

The judgment of reversal and order granting a new trial should be reversed, and the judgment for the plaintiffs entered on the report of the referee should be affirmed, with costs.

Morris *v.* Peckham.

Supreme Court of Connecticut, 1883.

51 Conn. 128.

Carpenter, J. The plaintiff invented an improvement in screw-drivers. He agreed with the defendant to assign to him one-half of his interest in the invention, in consideration of which the defendant agreed to pay the expense of procuring letters-patent, to furnish the necessary capital for the purchase of stock, machinery, and tools, and to unite with the plaintiff in the business of making and selling screw-drivers for their joint benefit.

Letters-patent were procured and business was carried on under the arrangement from the spring of 1879 until October, 1880, when the defendant stopped business, refusing to continue it longer, alleging as a reason that it was a losing and not a paying business.

The plaintiff in his amended complaint claims: 1st, that an account be taken; 2d, a specific performance, or, if that is impracticable, a rescission of the contract; or, 3d, damages. The Superior Court found the facts, the amended complaint conforming to such finding, and appointed a committee to take the account. The account as stated by the committee shows a considerable balance due the defendant. The Court, against the remonstrance of the plaintiff, accepted the report and rendered judgment for the defendant to recover his costs. The plaintiff appealed.

We will first consider the questions arising on the remonstrance.

1. It appeared before the committee that the defendant sold the tools, machinery, etc., and the plaintiff claimed that he received therefor the sum of $1,000, and that he should be charged with that sum. There was other evidence as to its value, and the committee found its value to be much less. On the trial of the remonstrance the Superior Court found that the sum of $1,000 was received by the defendant for the machinery and other property belonging to the defendant. The value of the other property did not appear.

There was no error in this. Besides, the Court allowed the defendant nothing for the expenses of tools, machinery, etc., and charged him nothing for their value when the business closed. Of this the defendant does not complain, and the plaintiff has no occasion to.

2. As tending to prove the value of said machinery, etc., the plaintiff offered in evidence the file in a case of Peckham *v.* Morris, in the Court of Common Pleas. This was offered because it contained an affidavit purporting to be that of the defendant as to the value of the same property. But it was proved to the satisfaction of the committee that the name of the defendant was inserted as the affiant by the mistake of the magistrate, and that it was not the affidavit of the defendant. The ruling of the committee in excluding this evidence was clearly correct.

3. The plaintiff, during the progress of the work, requested the book-keeper to keep an account of the cost of making two thousand one hundred and fifty screw-drivers. He "attempted for a time to keep such an account, but never completed the same. The plaintiff offered what was claimed to be a copy of said book in evidence to show the actual cost of making the screw-drivers, but the Court excluded the same."

That account of itself, incomplete as it was, was clearly inadmissible for the purpose for which it was offered.

4. The plaintiff offered to prove that after the business closed he offered the defendant a certain sum for his interest in the concern, and that the defendant put a price on his interest and offered to sell for a given sum. The committee ex-

cluded this evidence. It is expressly found that these offers, whatever they were, were made during the attempts to compromise their differences, and after the business had been closed. We think the ruling was correct.

5. The defendant, as a part of his charges, filed a bill of sundry expenses. To many of these items the plaintiff objected. The committee rejected some and allowed others to the amount of $455.12. The plaintiff objected to the acceptance of the report on the ground that he did not know what items were rejected and what were allowed.

This objection was not well taken. Inquiry of the committee would unquestionably have elicited all the information desired.

6. We do not think that the omission of the committee to report a definite balance was a sufficient cause for rejecting the report. He reported the items allowed with sufficient certainty to enable the Court to render an intelligible and just judgment.

7. The fact that the plaintiff had knowledge that certain expenditures were being made, and made no objection thereto, was before the committee as matter of evidence. Its being used as such does not appear to have been objected to by the plaintiff. Charging the plaintiff with such knowledge is not alleged as a reason for setting aside the report, and would have been clearly insufficient if it had been.

8. The committee allowed for the labor of John Peckham and F. E. Peckham in the business the sum of $871. This is urged as a reason for setting aside the report.

The case shows that the plaintiff knew that these parties were employed in the business at the time, and made no objection, but allowed them to continue in the business and perform the services; that the services were valuable; that the defendant exercised his best skill and judgment in employing them; and inferentially it appears that their services were necessary.

In the terms of the contract between the parties, as found by the Court, we discover nothing that prohibits the employment of suitable help. The defendant in this matter having acted in good faith, we think the items were properly allowed.

The plaintiff further claims that the judgment of the Court upon the facts was erroneous.

In the first place, he insists that he was entitled to a specific performance. The foundation of this claim is that the contract was to run seventeen years or during the life of the patent. Assuming that to be so, the contract was clearly within the statute of frauds as not to be performed within a year, unless the operation of the statute was prevented by some one of the circumstances referred to. It is claimed that the contract is in writing and signed by the party so as to meet the requirement of the statute. The writing signed by the party was primarily an assignment of one-half of the plaintiff's interest in the invention to the defendant. It then stipulated that neither party would make any assignment, grant, or license, of or under said letters-patent, without the written consent of the other, and that neither party would manufacture or use the invention, or sell the same to others to use, except upon such terms as should be mutually agreed upon. It contained no reference whatever to the contract of the defendant for furnishing capital, tools, and machinery, and for uniting with the plaintiff in the business of making and selling screw-drivers for their joint benefit. Moreover, this part of the contract is expressly found to have been verbal, and we must so regard it.

Nor was the contract fully executed by the plaintiff. It is a mistaken view of it to say that all the plaintiff was to do was to execute an assignment of one-half of his interest in the invention. He was to unite with the defendant in carrying on the business, and his duties in that regard were to continue during the whole period of time the contract was to run. And this it will be remembered is that part of the contract which the plaintiff claims the defendant should specifically perform. The same remarks apply, and show that the claim that one side of the contract was to be performed within a year is not well founded.

But it is insisted that this is a contract in the nature of or relating to a partnership, and therefore not within the statute.

That a parol contract concerning partnerships will be held good for many purposes is not denied. It is doubtless so where third persons deal with the parties as partners and seek to hold them liable as such. And so as between the parties themselves, where the agreement has been wholly or partially performed, Courts will treat them as partners. But we are not aware of any case in which the Court, at the instance of one of the parties, has compelled the other party to perform a parol agreement for a partnership. It is a rule in equity that the Court will not decree a specific performance where it has no power to enforce the decree. Hence partnership articles will not be enforced, especially where no time is fixed for its continuance, as either party may dissolve it at pleasure. And even where a time is fixed it is difficult to see how the decree can be enforced. Take this case as an illustration; is the Court to keep its hand on the parties for seventeen years and compel them to carry on this business?

Again. The terms of this contract are vague and indefinite. Not only is this so in respect to time, but also in respect to the extent and manner of carrying on the business. How much capital is to be invested? How many sets of machinery are to be used? How many men are to be employed? How many screw-drivers are to be made in a year? What duty shall be assigned to each of the partners? All these are matters which the contract does not determine, and which a Court of Equity cannot determine.

Furthermore, the business as hitherto carried on was clearly a losing business. Of what possible benefit can it be to the plaintiff to have it continued? Can it be seriously contended that the Court will direct its continuance as heretofore? Or, what is even more absurd, will the Court undertake to prescribe the manner of conducting the business so as to make it profitable?

We conclude then that the contract is within the statute of frauds, and that, independently of the statute, it is of such a nature that it cannot be specifically enforced.

But if not entitled to a specific performance, the plaintiff

insists that he is entitled to be restored to his ante-contract condition and to have the patent re-conveyed to him and to be compensated in damages. It is difficult to see upon what principle this claim can be sustained. As we interpret the contract the defendant has not broken it. Everything that the contract legally required him to do he has done. He performed the contract literally except as to continuing the business for seventeen years. If the contract is to be interpreted as requiring that absolutely, we think it was within the statute of frauds.

We are inclined, however, to interpret the agreement as a contract to continue the business for a reasonable time, to be determined from a consideration of all the circumstances of the case. It is apparent from the record that the defendant engaged in the business long enough to demonstrate that it could not be carried on successfully, and we are disposed to regard that as a reasonable time.

One view of the contract makes it void by the statute, and the defendant was not bound to perform it. The other view shows that it was substantially performed. In either event the defendant incurred no liability.

In respect to the patent, we think that the defendant paid the consideration, and, as he never contracted to return it, if it is worth anything he is entitled to retain it.

One other matter remains to be noticed. The plaintiff insists that he is entitled to costs, for the reason that the defendant refused to render an account until directed to do so by the Superior Court. We think that the matter of accounting was so intermingled with the equitable relief prayed for that costs were discretionary with the Court. The manner in which that discretion was exercised will not be reviewed in this Court.

There is no error in the judgment.

Wentworth's Lindley, 406–455; Jordan *v.* Miller, 75 Va. 442; Huntley *v.* Huntley, 114 U. S. 394; Whipple *v.* Parker, 29 Mich. 369.

2. EACH PARTNER'S IMPLIED POWERS.

BOARDMAN *v.* HACKLEY.

Supreme Court of Iowa, 1857.

5 Iowa, 224.

THE plaintiffs claim to recover the price and value of four pianos, alleged to have been sold and delivered to defendants as partners. Hackley answers, and denies that any pianos were sold and delivered to himself and Adams, as partners. Adams answers, and denies any indebtedness to plaintiffs, either by himself individually, or as a member of the firm of Adams & Hackley. He averred further that the said firm was not a general partnership, but a partnership in the newspaper and printing business only, and that the pianos were sent to A. W. Hackley, one of the defendants, to be sold on commission, and not to said partnership firm, nor to him, the said Adams. Issues joined on these answers were tried by a jury. It was shown by plaintiffs that defendants were partners in publishing the *Tribune* newspaper, in Dubuque, and in the book and job printing business. Certain letters between the parties were also read in evidence as follows:

DUBUQUE, June 19, 1854.

MESSRS. BOARDMAN & GRAY.

Dear Sirs:—Your advertisement of pianos is in our paper, and your offer to us of an agency we accept. But in order to make it profitable to you, it will be expedient, if not necessary, to have one of the instruments here, as there is not one of your make in our city. Being a musician myself, and a member of the "Philharmonic Society" in this place—just formed—I am pretty confident that something can be effected, as the society, of which I am a member, anticipate purchasing one soon, and their action will control the purchase of many more. I make these suggestions; if you think there is any advantage to be gained, please inform us; and if you choose

to act upon this suggestion forward us one of your piano cuts, and charge us for the same, as we shall want it for our circulars.

W. A. ADAMS.

DUBUQUE, June 19, '54.

W. G. BOARDMAN, ESQ.

Dear Sir:—Annexed you will receive the letter of our Mr. Adams. Beside being an honorable and estimable man, and the best practical printer in the State, he stands at the head of the musical department in this city. I think you would promote your interest by shipping us, at once, a small but select assortment of your instruments. There are none now here on sale. . . . I think an early and good supply would keep out competition for a long time. But determine for yourself how many (if any) you will send.

A. W. HACKLEY.

ALBANY, June 23, 1854.

MESSRS. ADAMS & HACKLEY:

Yours of the 19th is at hand, and would say in reply we do not consign piano-fortes on commission. Our orders are constantly far ahead of our ability to supply our sales for cash or time. We have a large number of applicants for piano-fortes on consignment which we decline. As, however, your place has attracted our attention, and believing that now is the time to introduce our instruments, and shut out others from competition, we have, after much thought, concluded to send you one or two pianos on the following conditions: Pianos, when delivered here on railroad or canal, will then be at your risk. On the sale of a piano you shall, if for cash, remit us the amount by draft on one of our banks or New York—said draft payable to our order and sent by mail. From enclosed price-list you may deduct fifteen per cent. If not sold for cash —on credit, ten per cent.—sold at your risk. Interest after four months. Remittances will bear interest on receipt. Should you prefer purchasing them out and out, we will give you six months' credit, and twenty per cent. discount; and if

cash be remitted on receipt of invoice, a further discount will be made of five per cent. after the twenty per cent. is deducted. These are our best terms. Should these propositions be agreeable you will please inform us, and of the class of piano-fortes you think will sell best with you. We shall, however, forward you one or two before we can receive your answer, and you had better get them insured on the receipt of invoice. . . . Should you continue to sell them, you will not, we presume, make any charge to us of an advertisement.

BOARDMAN & GRAY.

TRIBUNE OFFICE, DUBUQUE, Sept. 29.

MESSRS. BOARDMAN & GRAY:

We have just effected a sale of your two pianos at six months. We have a prospect of selling two or three more if we had them. A. W. HACKLEY.

The plaintiffs further gave in evidence, that in addition to the two pianos first shipped to defendants, they subsequently, and pursuant to the letter of Hackley dated September 29, shipped to them two others; one October 7, and the other October 14, 1854; and that they were sold on the customary terms of plaintiffs, to wit: Twenty per cent. discount as stated and contained in the letter of plaintiffs to defendants dated June 23, 1854. The pianos last shipped were left by Hackley, one of the defendants, with a merchant in Dubuque to be sold on commission, who paid the proceeds over to Hackley. Adams was not known in the transaction with the commission merchant. The partnership of Adams & Hackley was dissolved about the 25th of August, 1854.

The defendant, Adams, asked the Court to charge the jury: 1. "That before Adams can be held liable, it is necessary for plaintiffs to prove that he had knowledge of the whole transactions, and consented thereto. 2. That if the letter of Boardman & Gray does not accept the offer and terms stated by Adams, it is necessary to bring home to Adams a knowledge of the contents of the letter of Boardman & Gray." These in-

structions were refused by the Court, and defendant, Adams, excepted. The jury found a verdict for plaintiffs. A motion for a new trial was overruled by the Court, and judgment rendered on the verdict. Defendant, Adams, appeals.

STOCKTON, J. The Court charged the jury that the plaintiffs must recover for pianos sold and delivered, or they could not recover at all; that if the pianos were sold to Hackley alone, and not to the firm, the plaintiffs could not recover in this action; that there must be satisfactory proof, either that the buying and selling of the pianos was within the scope of the partnership business of defendants, or that they jointly ordered the pianos from plaintiffs, before they can recover; that plaintiffs having sued for pianos sold and delivered, cannot recover on proof that the pianos were sent to defendants to be sold on commission, or on any other proof falling short of proof of sale and delivery; and that the jury must examine the testimony with reference to each of the defendants separately. It is first assigned for error, that the District Court refused to charge the jury that it was necessary for plaintiffs to show that Adams had knowledge of the whole of the transactions, and consented thereto (or what was equivalent thereto), before he could be made liable. It is assumed that the refusal of the Court to charge the jury as requested was in effect saying to them that one member of a partnership firm, without the consent of the other partner, can bind the firm in matters which are without the scope of the partnership business.

The law is well settled, as claimed by defendants' counsel, that one partner cannot bind the firm by any contract made in the name of the firm, unless it be in a matter within the scope of the partnership dealings or falling within the ordinary business and transactions of the firm: Western Stage Co. *v.* Walker, 2 Iowa, 512; Story on Partnership, § 322. Looking at all the instructions given in this case, and at the testimony contained in the record, we cannot say that the Court undertook to lay down a different rule, or that there was

error in refusing the instructions asked. The respective letters of Adams & Hackley to plaintiffs of June 19, 1854, though signed in their individual names, were evidently written in the name and upon the business of the firm. Adams says: "Your advertisement of pianos is in our paper, and your offer to us of an agency we accept." Attached to this is the letter of Hackley in which he says: "I think you would promote your own interests by shipping to us a small but select assortment of your instruments." The jury were told that "they must be satisfied that the business of buying and selling pianos was within the scope of the partnership business, or that defendants jointly and as copartners specially ordered the pianos, before a joint liability was incurred." By this instruction the question of fact was left for the determination of the jury whether the dealing in pianos had been made a part of the business of the firm. And from the evidence we think they were authorized to infer that the defendants concurred in accepting, in the name of the firm, the agency offered them by plaintiffs, and had agreed to add to their regular partnership business that of dealing in pianos.

It is to be observed that defendants in their letters to plaintiffs make no stipulation as to the terms on which the pianos are to be sent to them. Nothing is said of their being sent to be sold on commission. They accept the agency, and advise plaintiffs to send on their pianos to them. In reply the plaintiffs inform them that they do not consign pianos to be sold on commission—they decline all such applications. They have, however, shipped to defendants two pianos on these terms: that they are to be at the risk of the defendants when delivered at Albany on the railroad or canal, and all sales are to be at defendants' risk; that the pianos are sold to them at the usual rates; but they agree to wait with defendants for payment until the pianos are sold by them, charging them interest on account after four months; and that if the defendants choose to purchase the pianos "out and out" twenty per cent. will be deducted from the invoice price at six months' credit —if for cash a discount of five per cent. additional will be

made. Upon these terms the first two pianos were shipped to defendants. Upon notice to them of the terms of the plaintiffs, if not acceptable to them, they should have notified plaintiffs of their dissent and their refusal to receive the pianos. Instead of this Hackley, one of the defendants, writes to plaintiffs from the *Tribune* office September 29: "We have just effected a sale of your two pianos at six months." Having made the dealing in pianos a part of their partnership business, and notified plaintiffs thereof, this letter, though written and signed by Hackley alone, binds the firm. There is no expressed dissent to the terms on which the pianos were sold to them, and no unwillingness manifested to continue the business and agency on the same terms. On the contrary, they inform the plaintiffs that they "have a prospect of selling two or three more if they had them." In accordance with this suggestion the remainder of the pianos charged are shipped to defendants.

Where a partnership firm, embarked in a particular business to which their engagements are confined, and to which alone their partnership contracts extend, by mutual agreement, enlarge the sphere of their operations, and include another branch of business, the power of each partner to bind the firm by his contracts is co-extensive with the whole business of the partnership; and the acts of each member are as binding on the firm in the new branch of business in which they are engaged as they are in the former regular and ordinary business. If Adams & Hackley agree to add the business of dealing in pianos to their regular business of printing and publishing newspapers, the acts of each member of the firm are binding on the other in everything connected with the buying and selling of pianos, and neither can object that the other partner makes contracts or incurs liabilities in the name of the firm, which, by virtue of the relation existing between them, shall bind them both. It was not necessary, therefore, in our view of the law and the facts, that the plaintiffs should prove that Adams had knowledge of all the transactions which passed between his copartner and the plaintiffs, and that he

consented thereto. He is presumed to consent to all the acts of his partner within the scope of the business of the firm.

The second assignment of error is upon the refusal of the Court to charge the jury "that if the letter of Boardman & Gray does not accept the offer and terms stated by Adams, it is necessary to bring home to Adams a knowledge of the contents of the letter of Boardman & Gray." The refusal to give this instruction was not erroneous. No offer of terms was made by Adams in his letter to plaintiffs. He informs them that the offer to their firm of an agency for the sale of their pianos is accepted by defendants, and advises plaintiffs that they had better have one of their pianos in Dubuque. Having accepted the agency proposed, and agreed to make the dealing in pianos a part of their business as a partnership, Adams, as one of the partners, is equally and jointly with Hackley liable for all pianos sold and delivered to the partnership firm. Even if Adams never saw or knew anything of the letter of plaintiffs, he is bound by the acts of his copartner.

Judgment affirmed.

Wentworth's Lindley, 124–128; Smith *v.* Collins, 115 Mass. 388; Sweet *v.* Morrison, 103 N. Y. 235; Jackson *v.* Todd, 56 Ind. 406.

Williams *v.* Frost.

Supreme Court of Minnesota.

27 Minn. 255.

Berry, J. The question in this case is whether a certain assignment for the benefit of creditors, made in January, 1879, is valid against an attaching creditor. The important facts are these: George H. Fairbanks and Neco J. Vandervelde were partners in trade, doing business at Anoka, in this State, under the name of Fairbanks & Vandervelde. The firm was in debt and insolvent. Between January 1 and 5, 1879, Vandervelde went to Holland, having been called there by the illness of his mother. He remained until after her death, re-

turning to this country in April following. Before he went to Holland he knew, as he expresses it, that "the condition of our firm financially was pretty ragged; that there were bills to be paid soon, and no funds to pay them with," some of the creditors having already pressed for payment. "I left," he says, "Fairbanks in charge of the business. I left in a hurry, and told him to do the best way he knew how, and whatever he should do I would be satisfied with. I left everything about the business and management of same to Fairbanks. . . . I told him to do what was best. I left it for him to do what in his judgment was best, in view of the financial condition of the firm." The testimony of Fairbanks is to the effect that when Vandervelde left there were large bills coming due from the firm—some already due when he left—no cash with which to pay them—business light; that on January 27, when the assignment was made, the firm was in bad shape, and creditors were pressing for the payment of their bills. Fairbanks also testified that, when Vandervelde left, he told him to do the best he could and he would be satisfied. This testimony does not appear to have been contradicted in any way. We have no doubt that it shows that Vandervelde expressly authorized Fairbanks to do anything that he could lawfully do in reference to the business and assets and indebtedness of the firm. One thing which he could lawfully do was to make an assignment of the assets of the firm for the benefit of creditors, with the assent of his copartner: Burrill on Assignments, 3d ed., 108, 330; Stein *v.* La Dow, 13 Minn. 412. In this case full authority to make such assignment, and full consent to the same, were included in the general authority to Fairbanks to do anything which he could do, as before stated. We have no doubt, then, that Fairbanks was authorized to make an assignment of the firm property.

The next inquiry is, was the assignment in proper form to bind the firm? As respects this inquiry, the important parts of the assignment are these, viz.:

"This agreement, made this 27th day of January, A. D. 1879, by and between George H. Fairbanks, as one of the co-

partnership firm of Fairbanks & Vandervelde, composed of the said George H. Fairbanks and Neco J. Vandervelde, and doing business under said firm name of Fairbanks & Vandervelde, as merchants, at Anoka; . . . and whereas the said George H. Fairbanks and Neco J. Vandervelde . . . are insolvent; . . . and whereas the said . . . Vandervelde is now . . . absent from the United States: . . . Now, therefore, this deed witnesseth that the said George H. Fairbanks, as one of said copartners, in consideration of the premises, and of the sum of one dollar to him in hand paid, . . . does hereby grant, bargain, sell, and convey, assign, transfer, set over unto said party of the second part, all the property, real, personal, and mixed, of the said copartnership. . . . In witness whereof the parties of the first and second part have hereunto set their hands and affixed their seals, the day and year first above written.

"GEORGE H. FAIRBANKS. [SEAL.]
"JOHN J. PENNER." [SEAL.]

Penner was the original assignee and party of the second part. In our opinion, as respects the manner of its execution, this assignment is in substance and effect the same as if, instead of signing it by his own name alone, Fairbanks had signed in this way: "Fairbanks & Vandervelde, by George H. Fairbanks." His intention to act for the firm in making the assignment, and the fact that he did so act, unmistakably appear on the face of the assignment itself, and emphatically so from the use of the expressions, "George H. Fairbanks, as one of the copartnership firm of Fairbanks & Vandervelde," and "as one of said copartners." The seal, if one be necessary, is good as the seal of the firm, in accordance with a familiar rule. The assignment is, therefore, that of the firm.

It is urged, however, that it fails to comply with that provision of the Act of March 4, 1876, Gen. St. 1878, c. 41, § 23, which requires assignments by debtors for the benefit of creditors to "be in writing, subscribed by such debtor or debtors, and duly acknowledged before an officer," etc. We think the subscription and acknowledgment of this assignment suf-

ficient. The subscription is that of the firm, by one of its members. It is in effect the usual way in which a firm subscribes a written instrument. The acknowledgment is properly that of the subscribing parties, for an acknowledgment must be a personal thing.

The remaining point as to the admissibility in evidence of the assignment, under the allegations of the complaint, is disposed of by what we have already said as to the point that the assignment is that of the firm.

Order affirmed.

Stein *v.* Ladow, 13 Minn. 412.

Some instances of implied powers before dissolution:

Each partner has implied power to employ labor or engage services such as are necessary to conduct the joint enterprise: Wentworth's Lindley, 147; Mead *v.* Shepard, 54 Barb. 474.

The respective members of a trading partnership have the authority to sign the name of the firm to commercial paper: Wentworth's Lindley, 129; Wilson *v.* Richards, 28 Minn. 337.

The giving of security for the debts of others is not within the scope of the firm's business: Selden *v.* Bank of Commerce, 3 Minn. 166.

A partnership being once proved, *aliunde*, acts, admissions, or declarations of a partner during the existence of the partnership, or relating to matters within the scope of the partnership, are evidence against the firm: Wentworth's Lindley, 128; First National Bank *v.* Carpenter, 34 Ia. 433; Munson *v.* Wickwire, 21 Conn. 513.

If it is a trading partnership, it follows by legal implication that it has borrowing power: Wentworth's Lindley, 131, 321; National Bank of Commerce *v.* Meader, 40 Minn. 325.

A release of one member of the firm releases the firm on the ground that the release of one joint debtor releases all: Tuckerman *v.* Newhall, 17 Mass. 581.

Some States have statutes enabling a creditor to compromise and settle with or release one joint debtor without prejudice to his claim against the rest: Gen. Stat. of Minn., '78, chap. 66, § 37.

But the copartner's right to call upon such released partner for his proportion is reserved in Minnesota: Minn. Gen. Stat., '78, chap. 66, § 40.

Each member of a trading partnership has implied authority to buy goods for the firm's business: Wentworth's Lindley, 134; Alabama Fertilizing Co. *v.* Reynolds, 79 Ala. 497.

One partner cannot execute the power to confess judgment without the consent of the other members of the firm: North *v.* Mudge, 13 Ia. 496.

Each partner has authority to collect the debts due the firm, and pay the debts it owes: Moist's Appeal, 74 Pa. St. 166.

Notice to one member of the firm of matters within the scope of the

firm's business, or knowledge of one, however derived, is notice to or knowledge of the firm: Hubbardston Lumber Co. *v.* Bates, 31 Mich. 158.

Each partner has power to sell and transfer any piece of the partnership property held for sale, but this implied power of sale only extends to such property as is held for the purposes of sale: Wentworth's Lindley, 146; Lamb *v.* Durant, 12 Mass. 54; Sloan *v.* Moore, 37 Pa. St. 217.

A partner has no power to bind the firm by an instrument under seal, for it is beyond the scope of the business. This rule is relaxed to the extent of permitting authorization by parol and validating the act by ratification, as well as allowing the executing of releases by one partner for the firm, on the ground that they do not create a new burden or obligation, only barring a right of action: Gibson *v.* Warden, 14 Wall. 244; McDonald *v.* Eggleston, 26 Vt. 154.

Whatever a partner can do he can do through an agent. He binds the firm if, with full knowledge of the facts, he ratifies an agent's unauthorized acts: Lyell *v.* Sanborn, 2 Mich. 109.

3. THE CAPITAL.

Taft *v.* Schwamb.

Supreme Court of Illinois, 1875.

80 Ill. 289.

Mr. Justice Scholfield delivered the opinion of the Court:

The principal question to be determined in the case before us is, upon whom shall the loss, in consequence of the destruction of the building, machinery, engine, boiler, tools, etc., mentioned in the articles of copartnership as delivered in as capital stock by Schwamb, fall? Upon Schwamb alone, or upon the parties in the proportion they are to share profit and loss? The latter was the conclusion of the Court below; but appellants insist that the former is the basis upon which the account should have been stated.

The articles stipulate: "This copartnership to commence on the twenty-eighth day of November, A. D. 1867, and to continue for the term of thirteen months and three days, ending on the thirty-first day of December, A. D. 1868; and to that end and purpose the said parties above named have each delivered in, as capital stock, as follows: Fred. Schwamb, the building known as No. 490 South Canal Street, and all ma-

chinery, including engine, boiler, tools, benches, lumber, all manufactured stock, and that under process of manufacture, now in his possession, supposed to be worth, say, $9,619.37, the same to be determined by an inventory. And the said J. W. Taft and D. R. Crego shall put in, as capital stock, the sum of $2,500, making a total capital stock of $12,119.37, to be used and employed in common between them for the support and management of the said business, to their mutual benefit and advantage. And it is further agreed between the parties to these presents that the said firm of Taft, Schwamb & Crego shall pay interest, annually, to F. Schwamb on the sum of $7,119,37, or on what he may have in excess of said Taft and Crego's investment." . . . "And it is also agreed that they shall and will, at all times during said copartnership, share, bear, pay, and discharge between them, each his share of all rents and other expenses that may be required for the support and management of the said business, and that all gains, profits, and increase that shall come, grow, or arise from or by means of their said business, shall, after paying the expenses as aforesaid, be divided between them, the said copartners to receive their shares as follows: F. Schwamb to receive one-half of all gains or increase, or if the business has been at a loss, then F. Schwamb to pay one-half of all such losses; J. W. Taft to receive one-fourth of all gains or increase, or to stand one-fourth of all losses in all business transactions during said copartnership; D. R. Crego to receive one-fourth of all gains or increase, or stand one-fourth of all losses in all business transactions during said copartnership."

It would, in our opinion, be difficult to employ language more clearly indicating that the "building, machinery, tools," etc., etc., became the property of the copartnership, and ceased to be the individual property of Schwamb than that employed in the articles. It was delivered in as "capital stock." What is "capital stock," in the sense in which the words are here used? Unmistakably, the capital or property of the copartnership. The total capital stock represents everything of

value belonging to the copartnership, and it is therefore impossible that property delivered in as "capital stock" could be anything else than copartnership property.

Being partnership property, the interest of each partner in it is to be determined by the extent of his interest in the partnership. It is said: "Each partner is possessed *per my et per tout*—that is, by the half or moiety, and by all, or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions, and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no *exclusive right* to any part of the joint effects, until a balance of accounts be struck between him and his copartners, and it be ascertained precisely what is the actual amount of his interest:" Gow on Partnership, 47; Story on Partnership, §§ 15, 16.

So, in Bopp *v.* Fox *et al.*, 63 Ill. 543, this Court said: "It is a well-known rule, governing the relation of partnership, that partnership property must first be applied to the payment of partnership debts, and that the true and actual interest of each partner in the partnership stock is the balance found due to him after the payment of all the partnership debts and the adjustment of the partnership account between himself and his copartners. And, in equity, real estate forms no exception, but stands on the same footing, in this respect, with personal property, no matter in whom the legal title may be vested."

It is undoubtedly true that the partners may, by contract, stipulate that the ownership of property may remain in one, while the partnership shall have only the use of the property, or make any other regulation, as between themselves, they

may choose, in regard to the ownership of property used in connection with the business of the copartnership, not prohibited by law; but the present case is unaffected by any such stipulation. The stipulation here, by making the property "delivered in" by Schwamb "capital stock," excludes the idea of a reserved ownership in him, and only a mere right to use the property by the copartnership.

But, it is contended, there is a limitation in the clause relating to the sharing of profit and loss, which shows that it was intended Taft and Crego were only to share in the losses resulting from business transactions prosecuted subsequent to the payment of the capital stock, and disconnected entirely from losses of capital stock. This is based on the words, "losses in all business transactions during said copartnership," which occur in the statement of the proportion of losses to be sustained by the respective parties in the event of loss.

We regard this as but another, although not precisely accurate mode of stating that losses in the partnership business shall be borne in the proportion there stated.

We have already seen that the property put in by Schwamb became partnership property, and the clause providing for the payment of interest by the firm to him on $7,119.37, or the excess in the amount paid in by him over that paid in by Taft and Crego, is a recognition that the firm was indebted to him in that amount. This shows, then, at the outset, the firm had a capital of $12,119.37, but was indebted $7,119.37, and the ownership was in the proportion of $2,500 in Schwamb to $2,500 in Taft and Crego jointly, or one-half in Schwamb and one-fourth each in Taft and Crego; from which it would result Schwamb should have one-half the profits and bear one-half the losses, and Taft and Crego each should have one-fourth the profits and bear one-fourth the losses, as is evidently intended by the clause under consideration. There is, in no view, in our opinion, anything in the clause negativing the idea that loss of capital should be borne in this proportion, and, in the absence of a contrary agreement, this is the equitable distribution of the burden.

Another clause in the articles of copartnership is as follows: "And it is further agreed between the said parties, that, if, at the expiration of said copartnership, said Taft and Crego shall wish to continue in said copartnership, and become equal owners in the capital stock, they can do so upon a renewal of said copartnership. The tools, fixtures, and machinery shall be put in at a discount of ten per cent. from the present inventory price."

This expressly recognizes the right of Taft and Crego to become equal owners in the capital stock on the terms then provided for, and, by implication, that they were then owners, but not equal owners of the capital stock. There is nothing which can be said, even inferentially, to recognize an individual ownership in property used by the copartnership, in Schwamb. The subsequent equal ownership may be, not of property then owned by Schwamb, but of the "*capital stock.*"

On January 1, 1870, which was at the expiration of the term of copartnership, as provided by the articles, the following was indorsed on the original articles and signed by the respective parties:

"By mutual consent, the above agreement will continue until January 1, 1871, with the exception of the interest of the partners, each partner's interest to be equal—that is, each one to have one-third of all profits, if any, and stand one-third of all losses in all business transactions during the continuance of this contract, the amount drawn out by each partner to be equal.

"J. W. Taft,
"Frederick Schwamb,
"D. R. Crego."

We think it clear that this was a continuation of the original copartnership as provided for in the clause quoted from the articles, and they thenceforth became equal owners in the capital stock. It is expressly provided that each partner's interest is to be equal. If each partner's interest is equal, then each has an equal interest in the capital stock, and, by consequence, should equally share in profit and loss, and the subse-

quent statement of the proportion of profit and loss to be shared cannot be presumed to have been intended as a limitation, other than as to the matters connected with the partnership, in contradistinction to losses that might be sustained outside of those matters.

It is claimed the Court erred in excluding evidence offered for the purpose of showing that the parties intended their interests should be different than we have held they were, under the written instruments made for the purpose of expressing their intentions.

The pleadings disclose no fraud or mistake in the execution of these instruments. It is charged in the bill, and admitted in the answer, that the partnership was formed, and re-formed, under them, and that the business was carried on pursuant to their terms. There is no cross-bill praying that they, or either of them, be corrected to conform to the intentions of the parties. It is admitted that the capital stock was made up, in the first instance, in the manner recited in the original articles. The professed object of the introduction of the evidence, however, is to explain a latent ambiguity.

This evidence has no tendency to prove a latent ambiguity. Its effect, if received, could, at most, but tend to prove contracts different from the construction we give to the written instruments—in other words, to contradict the writing by parol, and it was properly excluded: Mason *v.* Park, 3 Scam. 534–5; Collender *v.* Dinsmore, 55 N. Y. 208; Norton *v.* Woodruff, 2 Comst. 155; Giles *v.* Comstock, 4 Comst. 272.

The objection that the interlocutory decree recites that the Court found that the building, machinery, etc., had been burned, without any evidence, is frivolous. The effect of that decree is merely to determine the rights of the parties under the contracts, and to state the basis upon which the account was to be taken. This recital might have been wholly omitted without affecting the case, and its insertion in nowise prejudiced appellants.

The objection that all the costs are decreed against appellants, when, since the object of the suit was to obtain a con-

struction of the written instruments in which the parties were mutually interested, they should have been divided equally, we do not think well taken. Appellants, by an unauthorized construction of the written instruments, and by refusing to account on any other basis, necessitated the bringing of the suit, and the payment of the costs properly falls on them.

We are of opinion there is no error in the record, and the decree will therefore be affirmed.

Decree affirmed.

Wentworth's Lindley, 320; Bradbury *v.* Smith, 21 Me. 117; Braun's Appeal, 105 Pa. St. 414; Clark's Appeal, 72 Pa. St. 142; Whiting *v.* Leakin, 66 Md. 255; Topping *v.* Paddock, 92 Ill. 92; Malley *v.* Atl. Ins. Co., 51 Conn. 222.

4. FIRM REAL ESTATE.

SHANKS *v.* KLEIN.

Supreme Court of the United States.

104 United States, 18.

MR. JUSTICE MILLER delivered the opinion of the Court.

This is a bill in chancery filed by John A. Klein and others against David C. Shanks, executor of the last will and testament of Joseph H. Johnston.

The substance of the bill is that in the lifetime of Johnston there existed between him and Shepperd Brown a partnership, the style of which was Brown & Johnston; that their principal place of business was at Vicksburg, in the State of Mississippi, where they had a banking-house; that they had branches and connections with other men in business at other places, among which was New Orleans; that they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent civil war; that this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business; and that early in the war, namely,

in 1863, Johnston died in the State of Virginia, where he then resided, leaving a will by which all his property, including his interest in the partnership, became vested in Shanks, who was appointed his executor.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war—the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston, and the other firms with which that was connected. Finding that suits had been commenced by creditors of the firm against him as surviving partner, and, in some instances, attachments levied, he became satisfied that unless he adopted some mode of disposing of the partnership property and applying its proceeds to the payment of the debts in their just order, the whole would be wasted or a few active creditors would absorb it all. Under these circumstances, acting by advice of counsel, he executed a deed conveying all the property of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, and providing that the surplus, if any, should be for the use of the partners and their heirs or devisees. Klein accepted the trust, and pursuant thereto paid debts with the lands, or with the proceeds of the sale of them.

There is an allegation that Shanks, while acting as executor, and about the time the deed of trust was made, had an interview with Brown, and, being fully informed of the condition of the affairs of the partnership, expressed his approval of what Brown intended to do. This is denied in the answer, and some testimony is taken on the subject. Other questions of bad faith on the part of Brown are raised. But in the view which we take of the case the record establishes that Brown acted in good faith, and did the best that could be done for the creditors of the partnership and for those interested in its property.

It appears that after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will,

instituted actions of ejectment against them. They thereupon filed this bill to enjoin him from further prosecuting the actions, and compel him to convey the legal title to the real estate which came to him by the will of his testator. A decree was rendered in conformity with the prayer of the bill, and Shanks appealed.

Being satisfied, as already stated, of the fairness and honesty of the proceedings of Brown and Klein and of the purchasers from them, and waiving as of no consequence, in regard to the principal point in the case, the allegation of Shank's concurrence in or ratification of Brown's action, we proceed to consider the question as to the power or authority of Brown, the surviving partner, to bind Shanks by the conveyance to Klein, and by the sales thereunder made.

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant that the equity of the creditors of the partnership to have their debts paid out of this property is superior to that of the devisee of Johnston. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a Court will enforce against Shanks as the holder of that title.

Counsel for the appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, had, for the purpose of paying the debts of the partnership, power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, that the trust deed which he made to Klein was effectual for that purpose, and that by Klein's sales to the other appellees they became

invested with this equitable title and the right to compel Shanks to convey the legal title.

One of the learned counsel for the appellant concedes that at the present day the doctrine of the English Court of Chancery "extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence, that partnership real estate is in fact in all cases, and to all intents and purposes, personalty." He maintains, however, that the principle has not been carried so far in the Courts of America; that the extent of the doctrine is that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the firm, and for any balance found due to either partner on a final settlement of the partnership transactions; and that the right of the surviving partner, and of the creditors through him, is no *more than a lien*, which cannot be asserted by a sale, as if the property were personal, but to the enforcement of which a resort to a Court of Equity is necessary.

We think that the error which lies at the foundation of this argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word, for if it be a lien in any sense it is also something more.

It is an equitable *right* accompanied *by an equitable title.* It is an *interest in the property* which Courts of Chancery will recognize and support. What is that right? Not only that the Court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose, and to that extent, it shall be treated as personal property of the partnership, and like other personal property pass under the control of the surviving partner. This control extends to the right to sell it, or so much of

it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court of Chancery, as stated by counsel for appellant. As this result was reached in that Court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject.

We think, also, that the preponderance of authority in the American Courts is on the same side of the question.

In the case of Dyer *v.* Clark, 5 Metc. (Mass.) 562, that eminent jurist, Chief Justice SHAW, while using the word "lien" in reference to the rights now in controversy, asks, "What are the true equitable rights of the partners as resulting from their presumed intentions in such real estate? Is not the share of each pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first, to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest indirectly in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq., § 1253), upon the property itself; but on the equitable principle that the real estate so held shall be deemed to constitute a part of the fund from which their debts are to be paid before it can be legally or honestly diverted to the private use of the parties. Suppose this trust is not implied, what would be the condition of the parties?" etc. "But treating it as a trust, the rights of all the parties will be preserved." It is clear that in the view thus announced the right of the creditors is something more than an ordinary lien.

In Delmonico *v.* Guillaume, 2 Sandf. (N. Y.) Ch. 366, where the precise question arose which we have in the present case, the Vice-Chancellor held that "Peter A. Delmonico, as the surviving partner, became entitled to the Brooklyn farm, and as between himself and the heir of John he had an absolute right to dispose of it, for the payment of the debts

of the firm, in the same manner as if it had been personal estate."

In so deciding he followed the English authorities, and cited Fereday *v.* Wightwick, 1 Russ. & M. 45 ; Phillips *v.* Phillips, 1 Myl. &. K. 649 ; Brown *v.* Brown, 3 Ib. 443 ; Cookson *v.* Cookson, 8 Sim. 529 ; Townshend *v.* Devaynes, 11 Ib. 498, note.

In Andrews's Heirs *v.* Brown's Adm'r, 21 Ala. 437, the Supreme Court said that, "inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying these debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose, for it would never do to charge him with the duty of paying the debts and at the same time take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title which descended to the heir of the deceased partner, yet as the heir holds the title in trust to pay the debts and the survivor is charged with this duty, his deed will convey the equity to the purchaser, and through it he may call on the heir for the legal title and compel him to convey it."

In Dupuy *v.* Leavenworth, 17 Cal. 262, Chief Justice Field, in the name of the Court, said: "In the view of equity it is immaterial in whose name the legal title of the property stands—whether in the individual name of the copartner, or in the joint names of all; it is first subject to the payment of the partnership debts, and is then to be distributed among the copartners according to their respective rights. The possessor of the legal title in such case holds the property in trust for the purposes of the copartnership. Each partner has an equitable interest in the property until such purposes are accomplished. Upon dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs-at-law of the deceased partner to perfect the purchase by conveyance of the legal title."

If the case could be held to be one which should be governed by the decisions of the Courts of Mississippi, because the principle is to be regarded as a rule of property, which we neither admit nor deny, the result would still be the same.

In one of the earliest cases on that subject in the High Court of Errors and Appeals of that State, Markham *v.* Merritt, 8 Miss. 437, Chief Justice SHARKEY, in delivering the opinion of the Court, concurs in the general doctrine that "when land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel." A careful examination of the Mississippi cases cited by counsel has disclosed nothing in contravention of this doctrine, or in denial of the authority of the surviving partner to dispose of such property for the payment of the debts of the partnership.

We are of opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, that they had a right to the aid of a Court of Chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston.

Decree affirmed.

Wentworth's Lindley, 343, n.; Arnold *v.* Wainwright, 6 Minn. 358; Brown *v.* Morrill, 45 Minn. 483; Fairchild *v.* Fairchild, 64 N. Y. 471; Lane *v.* Tyler, 49 Me. 252.

5. THE MAJORITY.

PEACOCKS *v.* CHAMBERS.

Supreme Court of Pennsylvania.

46 Pa. St. 434.

STRONG, J. The plaintiffs and defendants entered into copartnership on the 8th day of February, 1860, for the purpose of publishing a daily newspaper in the city of Philadelphia. By the articles of copartnership it was agreed, among other things, that the stock of the firm should be divided into fifty

shares, and that each proprietor should be interested in the proprietorship, stock, property, profits, and losses, in the proportion which the share or number of shares held by him bore to the whole number of shares. It was agreed that the association should continue for the full period of five years, from the first day of February, 1860, and that at the expiration of that time, or upon its other sooner dissolution, the stock and property should be sold, divided, or otherwise disposed of. It was also stipulated that an editor should be employed, from time to time, for a term of not more than five years, at any one engagement, and at a salary of not more than $2,000 per annum; and also a publisher for a term of not more than five years at any one engagement, at a salary of not more than $1,200 per annum, each of whom, during the term of his employment, should be a proprietor.

The complainants are the holders of twenty-seven shares of the stock, and the defendants are the holders of the other twenty-three shares.

The bill avers that on the 8th of February, 1860, James S. Chambers, one of the defendants, was elected publisher of the newspaper, but that neither at the time of his election nor subsequently was any term assigned for the duration of his employment; that he continued to act as publisher until August 16, 1862, but did not devote care, skill, and attention to the business of the department to which he had been assigned; that in the month of April, 1861, he accepted an appointment as navy agent, at Philadelphia, the duties of which office have occupied his time and attention ever since, to the exclusion of the interests of the copartnership. The bill further charges that at a regular meeting of the association, held on the 16th of August, A. D. 1862, at which all the proprietors were present except Ferdinand L. Fetherston, one of the complainants (he, however, having been represented by his proxy), a resolution was passed, removing the said J. S. Chambers from being the publisher, and appointing the said Fetherston in his stead, and that the resolution received in its favor the votes of the holders of twenty-seven shares of the stock. The bill

further avers that from the time of the adoption of said resolution to the present, the defendants have refused to permit Fetherston to act as publisher of the newspaper in place of the said Chambers, and have hindered and prevented him from entering on the duties of his appointment, in violation of the articles of the association. The complainants therefore pray that the defendants may be enjoined against denying to the said Fetherston the right to publish the said newspaper, and against interfering or intermeddling with him in the exercise of his rights as publisher, and against refusing him access to said paper and all the property of the copartnership, and against disobeying or interfering in any way with the resolution passed August 16, 1862.

To this bill the defendants have put in separate answers. They agree in substance in denying that Chambers held his appointment at the will of the association, or of the complainants, who are a majority of the partners, and they assert in answer to interrogatories propounded, that the defendant, Chambers, was on the 8th day of February, 1860, selected and chosen publisher of the newspaper, and that it was distinctly understood and agreed, by and between the said Chambers and the said partners, that the term of five years was assigned between themselves, and agreed upon with him for the term of his employment, and that he was not to be discharged from his office or employment during the said term.

We have, then, a case of a partnership in which a majority of the partners, both in number and interest, have determined that the duties of publisher, as defined in their fundamental articles, shall be performed by an agent whom they have chosen. The agent was eligible, for he was a proprietor. So far as it was in their power, the majority have not only imposed upon him those duties, but they have conferred upon him all the rights and privileges which, under the articles of copartnership, belong to the office of publisher. Such is the effect of the resolution of August 16, 1862, and this was done at a regular meeting of all the partners, at which each

was allowed a voice. With this action of the majority the defendants are not only dissatisfied, but they deny the power to pass such a resolution appointing the complainant, Fetherston, the publisher, and one of them refuses to permit him, though thus appointed, to enjoy the rights and enter on the duties of his appointment.

That it was the action of the firm, and obligatory upon all the partners as such, is maintained, both in reason and authority, unless it was in conflict with the fundamental articles. In Collyer on Partnership, 104, the author, after remarking that it had been said by a learned writer (Chitty's Laws of Commerce, vol. 3, p. 224) that, in the absence of an express stipulation, a majority must decide as to the disposal of the partnership property, adds that "it may perhaps be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary transactions of the partnership." In Story on Partnership, c. 7, § 123, the author says: "But another question may arise, and that is, whether, in case of partnership, the majority is to govern in case of a diversity of opinion between the partners as to the partnership business and the conduct thereof, or whether one partner can, by his dissent, arrest the partnership business, or suspend the ordinary powers and authorities of the other partners in relation thereto against the will of the majority, where there is no stipulation in the partnership articles to control or vary the result (for, if there be any stipulation that ought to govern), the general rule would seem to be that each partner has an equal voice, however unequal the shares of the respective parties may be, and the majority, acting fairly and *bona fide*, have the right and authority to conduct the partnership business within the true scope thereof, and dispose of the partnership property, notwithstanding the dissent of the majority."

If, then, the rule be that in the management of the interior affairs of a partnership, a majority of the partners must govern, what is there in this case to take it out of the rule? Why is not the resolution adopted on the 16th of August, 1862, at a

meeting of all the partners, obligatory upon them all, it having been voted for by a majority in number, and by those who held more than half the number of shares?

The parties agreed that a publisher should be elected for a term not exceeding five years. They fixed a maximum period of service beyond which they could not transgress, but no minimum was defined. The articles left it in their power to employ a publisher for any less term than five years. Duration of service was left to be defined by agreement, outside of the articles, or, if not defined, it was necessarily at will. Of course, if not defined by agreement, any incumbent was removable by the firm. Clearly, therefore, it rests upon the party which denies power to remove to show that the power was fettered by an agreement for a definite period of service not expired when the resolution of August, 1862, was adopted. This is not shown by the pleadings.

And as the pleadings do not show any hiring or employment of Mr. Chambers for a definite term, so the proofs taken utterly fail to establish it.

And now, to wit, May 6, 1863, this cause having come on for argument at the January Term last, and having been argued by counsel, it is considered, adjudged, and decreed that the decree of this Court entered at the hearing at Nisi Prius be reversed, and that the defendants, James S. Chambers, Alexander Cummings, and Thomas J. Williamson, and each of them, their servants, agents, and workmen, be perpetually enjoined and restrained from denying to the complainant, Ferdinand L. Fetherston, or to such other person or persons as may be appointed by the members of the firm of Peacock, Chambers & Co., the right to publish the newspaper described in the complainants' bill, or any of the rights and privileges which belong to the office of publisher, under the articles of association of the firm; and that they be further enjoined and restrained from interfering or intermeddling with said Ferdinand L. Fetherston, in the exercise of his rights as publisher of said paper, and from refusing him access thereto, and to all the property of the said copartnership, and from disobeying

or resisting in any way the resolution adopted on the 16th of August, 1862.

And it is further ordered that the defendants pay the costs.

Wentworth's Lindley, 313, 314, n.; Western Stage Co. *v.* Walker, 2 Iowa, 504; Kirk *v.* Hodgson, 3 Johns. Ch. 400.

A majority could not take up a new business, change the nature of the business, increase the number of shares or reduce the capital: Livingston *v.* Lynch, 4 Johns. Ch. 573; Smith *v.* Goldworthy, 4 Q. B., 45 Eng. Com. Law, 430; Abbot *v.* Johnson, 32 N. H. 9.

6. EACH PARTNER'S LIABILITY.

BENCHLEY *v.* CHAPIN.

Supreme Court of Massachusetts, 1852.

10 Cush. 173.

SHAW, C. J. The petitioner sets forth that he was duly appointed assignee under proceedings in insolvency against John Leland, an insolvent debtor. Among the assets of the estate was a promissory note, given by Benchley & Jackson, a firm of which Benchley, the petitioner, was a partner, secured by a mortgage of real and personal property. Before a dividend, and without authority from the commissioner, the assignee sold this note and mortgage, at public auction, for about half the par value, and credited the proceeds in his account. The commissioner rejected this credit, and required him to credit the estate with the whole amount of the note as of a debt due from himself. The object of this petition of the assignee to this Court is to obtain a reversal of this order, and authorize him to discharge himself from all further liability to the estate of the insolvent on this note, by accounting for the proceeds of the sale.

The Court are of opinion that the decision of the commissioner was right. Each partner is liable *in solido* for the entire debt. The assignee was debtor to the estate, of which he himself was sole representative and trustee, for the whole

debt. He had no release or discharge of any sort, and no proceedings in insolvency had been commenced indicative of his inability to pay the whole debt.

In the first place, it seems very clear that if he could sell his own debt, as he could other choses in action, this sale was premature, irregular, and void. But suppose it valid, what did he sell? Certainly, a right to recover the whole debt. At whatever discount the purchaser obtained it, he obtained a legal right to recover the par value of the note. The result therefore might be that, although the creditors were entitled to the whole, and the debtor in theory of law is bound to pay the whole, and for aught that appears, is able to pay the whole, and might in fact pay the whole to the purchaser, yet the creditors would lose one-half, and that through the default of the only person placed by law as a trustee to protect their rights.

As a general rule of law, when the same person is bound to pay money in one capacity, and it is his duty to recover it and account for it in another, as he cannot pay himself, the law presumes that he has done what it was his duty and in his power to do, and holds him chargeable, as if actually done. It is upon this principle that an administrator is held bound to account for his own debt to the estate of his intestate as assets; Winship *v.* Bass, 12 Mass. 203; Ipswich Manufacturing Co. *v.* Story, 5 Met. 313.

This rule, not founded on any statute or positive rule of law, almost necessarily arises out of the exigencies of the case. The assignee can take no measures to enforce the payment of a debt due by himself, as debtor to himself, as assignee. Knowing that he is a debtor when he assumes the trust and office of assignee, his assent to charge himself with the amount of his debt is tacitly admitted by the acceptance of the office. Whether, if a debtor to the estate of an insolvent should accept the office of assignee, through inadvertence or mistake of the law, or if by losses occurring afterward, should become in part insolvent, he might be allowed to resign, and enable the creditors to choose another assignee, to

act as their representative, in collecting such debt of the assignee who has resigned, it is unnecessary to consider, for no such question is presented. Perhaps such a course might, upon a proper case shown, be deemed equitable and reasonable, especially when necessary for the relief of the sureties of the assignee.

It was stated in the facts agreed that at the time of the sale of this note and mortgage, Benchley & Jackson offered to release all their right of redemption of the mortgaged property, to the purchaser. So far as there was value in the mortgaged property over and above prior liens, this might be of use to the purchaser. But it did not diminish or affect the personal liability of the promisors, including that of the assignee, for the payment of the whole note.

Order of the commissioner requiring the assignee to credit the estage with the whole amount of Benchley & Jackson's note, in his account as assignee, affirmed, and petition dismissed with costs.

Petition dismissed.

Wentworth's Lindley, 200, n.; Parson's Sec. 249; Nebraska R. R. Co. *v.* Lett, 8 Neb. 251; Medberry *v.* Soper, 17 Kan. 369; Collins *v.* Charlestown Mut. Fire Ins. Co., 10 Gray, 155.

This liability, during the lifetime of the partners, is joint, and not joint and several; hence all must be joined as defendants: Bowen *v.* Crow, 16 Neb. 556.

But some States have by statute changed this liability into a joint and several liability: Ala., Ark., Col., Ga., Kan., Ky., Miss., Mo., Mont., N. J., New Mex., N. C., and Tenn.

The Minnesota statutes permit a partnership to be sued in the firm name, and the decisions apparently hold that the liability is joint and several: Minn. Stat. '78, chap. 66, § 42, 287; Daly *v.* Bradbury, 46 Minn. 396; Gale *v.* Townsend, 45 Minn. 357.

A statutory form of partnership, based upon a limited liability, is found in Canada, in the Commonwealths, District of Columbia, and Territories, excepting Arizona, Idaho, and New Mexico, in which the partners, called special, risk only the amount of their capital, and the others, called general, incur an unlimited liability: Gen. Stat. of Minn., '78, chap. 30.

7. TORTS.

Loomis *v.* Barker.

Supreme Court of Illinois, 1873.

69 Ill. 360.

Mr. Justice Scholfield delivered the opinion of the Court:

We are unable to discover any error in this record for which this judgment should be reversed.

The proof is sufficiently clear that the horses belonged to appellee, and that, at the time they were taken, they were merely in the possession of Cook as a general agent, who was authorized to sell them for appellee, and required to account to him for the proceeds of their sale. This did not invest Cook with any title to the horses so as to render them liable to be seized on execution or attachment against him, and sold for the payment of his debts.

Although it does not appear that Lewis was actually present when the horses were levied upon or sold, yet it does appear that he placed the claim upon which this was done in the hands of the constable, Bogue, and that his partner and co-defendant, Loomis, treated and spoke of the property as having been taken and sold on an attachment issued upon this claim; that he was present and a bidder at the sale, and that he received the proceeds of the sale from Bogue, as a payment upon this claim.

The rule is that partners are liable *in solido* for the torts of one, if that tort were committed by him as a partner, and in the course of the business of the partnership: Parsons on Partnership, 150. "So," it is said, "in an action of trover, it is not necessary that there should be a joint conversion in fact, in order to implicate all the partners, for such a conversion may arise by construction of law. Thus, an assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded a conversion:" Gow

on Partnership, 175. See also Bane *et al. v.* Detrick *et al.*, 52 Ill. 20.

We think the verdict was, under the evidence, in conformity with the law, and the judgment of the Court below is therefore affirmed.

Judgment affirmed.

Wentworth's Lindley, 147 *et seq.*; Fletcher *v.* Ingram, 46 Wis. 191; Rolfe *v.* Dudley, 58 Mich. 208; Coleman *v.* Pearce, 26 Minn. 123; Gwynn *v.* Duffield, 66 Ia. 708.

In collecting debts due the firm one cannot use extraordinary methods and bind innocent members for torts committed in their behalf: Woodling *v.* Knickerbocker, 31 Minn. 268.

8. MERGER.

Mason *v.* Eldred et al.

Supreme Court of the United States, 1867.

6 Wall. 231.

On certificate of division between the Judges of the Circuit Court for Wisconsin. A statute of Michigan, known as "the Joint Debtor Act."[1] thus enacts:

1. "In actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process issued against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such a case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants, in the same manner as if all had been served with process.

2. "Such judgment shall be conclusive evidence of the liabilities of the defendant who were served with process in the suit, or who appeared therein; but against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

[1] Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219.

Other sections provide that execution shall be issued *in form* against all of the defendants; that the execution shall be levied on the sole property of the defendant served, or on the joint property of all the defendants, and that the plaintiff may sue out a *scire facias* against the defendants not served to show why the plaintiffs ought not to have execution against them, the same as if they had been served with the process by which the suit was commenced.

With this statute in force in Michigan, Mason sued, in the Circuit Court for *Wisconsin*, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on *Anson* Eldred alone, who alone appeared, and pleaded *non assumpsit*. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the State Courts of Michigan, showing that Mason had already brought suit in that Court on the same note against the partnership; where, though *Elisha* Eldred was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat a recovery against Anson Eldred, was certified to this Court for decision as one on which the Judges of the Circuit Court were opposed.

Mr. Justice FIELD, after stating the case, delivered the opinion of the Court, as follows:

The counsel of the plaintiff suggests that the question presented by the certificate of the Judges of the Circuit Court is divisible into two parts: 1st. Whether the record of the judgment recovered in Michigan was admissible under the plead-

ings; and, 2d. Whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit.[1] On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships

[1] Young *v.* Black, 7 Cranch, 565; Young *v.* Rummell, 2 Hill, 480.

are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord MANSFIELD in giving the judgment of the King's Bench in Rice *v.* Shute,[1] "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the Court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the nonjoinder of his copartners was not pleaded in abatement.

The plea itself, which, as the Court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of Sheehy *v.* Mandeville & Jamesson, decided by this Court, and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought

[1] Burrow, 2511.

upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the Court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different States. It was elaborately reviewed by the Supreme Court of New York in the case of Robertson *v.* Smith,[1] where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of Robinson *v.* Smith was made.[2] In Wann *v.* McNulty,[3] the Supreme Court of Illinois commented upon the case of Sheehy *v.* Mandeville, and declined to follow it as authority. The Court observed that notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several State Courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In Smith *v.* Black,[4] the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the Court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

[1] 18 Johnson, 459.
[2] Ward *v.* Johnson, 13 Massachusetts, 148.
[3] 2 Gilman, 359.
[4] 9 Sergeant & Rawle, 142.

In its opinion the Court referred to Sheehy *v.* Mandeville, and remarked that the decision in that case, however much entitled to respect from the character of the Judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In King *v.* Hoar,[1] the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the Court of Exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. It the course of the argument the case of Sheehy *v.* Mandeville was referred to as opposed to the conclusion reached, and the Court observed that it had the greatest respect for any decision of Chief Justice MARSHALL, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice STORY, in Trafton *v.* The United States,[2] refers to this case in the Exchequer, and to that of Sheehy *v.* Mandeville, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for

[1] 13 Meeson & Welsby, 495.
[2] 3 Story, 651.

they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding Sheehy *v.* Mandeville, to hold that the promissory note was merged in the judgment of the Court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that State[1] the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in Court, which means until citation is issued to him, and opportunity to be heard is afforded.[2] Nor is the demand against the parties not sued merged in the judgment against the party brought into Court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only

[1] Compiled Laws of Michigan of 1857, vol. 2, chap. 133, page 1219.
[2] D'Arcy *v.* Ketchum, 1 Howard, 165.

be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the State to limit the operation of the judgment thus recovered. The State can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the State of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the Court, if found within the State, that such parties may be sued upon the original demand.

In Bonesteel *v.* Todd,[1] an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the joint debtor act of New York, process in that State having been served upon his co-defendant alone. The Court below held the judgment to be a bar to the action. On error to the Supreme Court of the State this ruling was held to be erroneous. After referring to decisions in New York, the Court said, "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be in-

[1] 9 Michigan, 379.

admissible, we think the action on the contract the better remedy to be pursued."

In Oakley *v.* Aspinwall,[1] the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that State upon the original demand. Mr. Justice BRONSON, speaking for the Court, says: "It is said that the original demand was merged in, and extinguished by the judgment, and consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the Court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that State, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

[1] 4 Comstock, 513.

Wentworth's Lindley, 254 *et seq.*; Wann *v.* McNulty, 2 Gilman, 359; Robertson *v.* Smith, 18 John. 459; Ward *v.* Johnson, 13 Mass. 148.

If the liability is joint and several the above principle does not apply: King *v.* Hoar, 13 M. & W. 494; Pierce *v.* Kearney, 5 Hill, 82; Gilman *v.* Foote, 22 Ia. 560. See Statutes of Ala., Ark., Col., Del., Ia., Kan., Ky., Md., Miss., Mo., Mont., N. J., Penn., New Mex., Tenn., Vt.

9. NOVATION.

YORK *v.* ORTON.

Supreme Court of Wisconsin, 1885.

65 Wis. 6.

APPEAL from the Circuit Court for Grant County.

For some years prior to 1876, one John L. Crawford rented a house in Hazel Green, Grant County, of the plaintiff. The accrued rent therefor amounted, in that year, to $800, and was wholly unpaid. John L. Crawford was a member of the firm of Crawford, Mills & Co., then doing business at Hazel Green. In December, 1876, he and another partner withdrew from the firm pursuant to an agreement between all the members thereof. This agreement required Crawford to convey to certain members of the firm his interest in 1,400 acres of land which the firm owned. He refused to deliver such conveyance until the members of the firm last mentioned should agree to assume the payment of such rent to the plaintiff, and relieve him from responsibility therefor. They agreed thereto, and he thereupon delivered the conveyance.

On March 3, 1877, John L. Crawford and the plaintiff stated this agreement to one Milligan, who was the duly constituted agent of the firm to settle and close its business, and the latter thereupon placed the amount of rent due the plaintiff on the books of the firm to the credit of Chandler & York, of which firm the plaintiff had been theretofore a member. The plaintiff and John L. Crawford both supposed the credit was given to the plaintiff individually, as it should have been. Chandler never had or claimed any interest in the rent. Crawford, Mills & Co. were indebted to Chandler & York, at the time, as appears by reference to the case of Jones *v.* Orton, *post*, p. 9. When this credit was given, the plaintiff orally released Crawford from all liability for the rent.

Gabriel Mills was one of the partners in the firm of Crawford, Mills & Co., who thus agreed to assume the payment of the rent to the plaintiff. He died in 1880. The plaintiff

presented his claim for such rent to the commissioners appointed to adjust claims against his estate, and they allowed it at $308.70. The defendant appealed from such allowance to the Circuit Court, where the matter was tried by the Court without a jury. The trial resulted in a judgment for the plaintiff for the full amount of his claim, to be paid in due course of administration. From this judgment the defendant appeals to this Court.

LYON, J. The facts set forth in the foregoing statement of the case were found substantially by the Circuit Court, and the evidence sustains the findings. We think there was an effectual substitution of those partners in the late firm of Crawford, Mills & Co. who succeeded to the assets of that firm (of whom Gabriel Mills was one), as the debtors of the plaintiff for the accrued rent, in place of John L. Crawford, the original debtor, who was released from liability therefor. In other words, there was an effectual novation, by which Gabriel Mills and his associates became liable to the plaintiff for such rent in place of John L. Crawford. True, the credit was erroneously entered by Milligan on the books of the latter firm in favor of Chandler & York, but it is not perceived why the plaintiff, who alone was entitled thereto, may not avail himself of the credit. To allow him to do so is no injustice to the substituted debtors, because Chandler claims no interest in the rent, and Crawford, Mills & Co. were indebted at that time to Chandler & York. Hence they may as well account to the plaintiff for the rent as to Chandler & York. We conclude that the plaintiff established his claim against the estate of Gabriel Mills, to the amount of $800.

It was maintained by counsel for the defendant that, because the plaintiff has not appealed from the award of the commissioners, he cannot recover in the Circuit Court any greater sum than the commissioners awarded him, which was $308.70. We do not concur in this proposition. The appeal of the defendant alone necessitated a trial *de novo* in the Circuit Court of the whole controversy. The award of the

commissioners thereupon ceased to be of any importance, and the parties stood in that Court as they stood before the commissioners. Had the award been admitted in evidence to show the sum awarded by the commissioners, it would probably have been error: Central Bank of Wis. *v.* St. John, 17 Wis. 157. The matter stood in the Circuit Court precisely as a case appealed from a justice of the peace where a trial *de novo* is required by law. Undoubtedly, in such a case, the judgment of the Circuit Court is unaffected by the judgment of the justice or the question as to which party appeals. It goes upon the merits, the same as though the case had been brought originally in the Circuit Court. Such is the rule in this and like cases.

Counsel for defendant based an argument in support of his position on § 4037, R. S., which provides that the Circuit Court may, on appeal from an order of the County Court, reverse or affirm the same, in whole or in part, etc. Many orders of the County Court are of a character that only admits of a reversal or affirmance on appeal. Others, like the award here, may require something more than a mere reversal or affirmance, either in whole or in part. The same section gives the Circuit Court ample authority to make the proper order or render the proper judgment in such cases, without regard to the amount awarded by the commissioners.

We conclude that the Circuit Court rendered the proper judgment, and hence that it should not be disturbed.

By the Court. Judgment affirmed.

Wentworth's Lindley, 239; Parsons, §§ 324, 325; Bank *v.* Green, 40 Ohio St. 431; Parmalee *v.* Wiggenhorn, 6 Neb. 322; Regester *v.* Dodge, 19 Blatch. 79.

Some States hold that the creditor, without assenting to the agreement, can take advantage of it: Powers *v.* Fletcher, 84 Ind. 154. But this doctrine is limited to the extent of permitting the creditor, though not assenting, to hold the new firm in case it has received assets for which their assumption of the debt was part consideration: Arnold *v.* Nichols, 64 N. Y. 117; Osborn *v.* Osborn, 36 Mich. 48.

When a person becomes a partner of an existing firm, or forms a partnership with another, in the latter's existing business, he does not become liable for existing debts nor does the new firm become liable for them: Gauss *v.* Hobbs, 18 Kan. 500.

The incoming partner may become liable for an existing indebtedness by an express or implied promise to pay it, or by assuming the debt on a consideration: Osborn *v.* Osborn, 36 Mich. 48; Coleman *v.* Pearce, 26 Minn. 123.

10. CONVERSION.

Whigham's Appeal.

Supreme Court of Pennsylvania, 1869.

63 Pa. St. 194.

Sharswood, J. The case of the plaintiff below is surrounded with many doubts and difficulties in the most favorable aspect of it to him. The master reported as an undisputed fact that Hamilton Whigham, Andrew Taylor, and Robert Taylor formed a copartnership, under the name and style of Whigham, Taylor & Co., for the purpose of running and carrying on the business of a portable saw-mill—Whigham owning two-thirds, and the other two each one-sixth. The plaintiff having obtained judgment against Hamilton Whigham, issued an execution under which he levied, and sold not his interest in the partnership but his interest in the mill. Partners have no separate title in any aliquot part of the partnership property. Their interest is an incorporeal—intangible thing—a right to an account, and to their share of the balance after all the partnership debts are paid and all equities between the partners adjusted. If upon an execution against one partner the sheriff should levy upon and sell his interest in a single bale of goods, it could not be maintained that his vendee would acquire his entire interest in all the assets. As the vendee of his interest in a single chattel it is not easy to see how the purchase could be made available, unless that chattel were separately to be sold and then charged with its proportion of the firm debts to the sum produced by the sale of all the other property and the collection of the outstanding credits of the firm. The only decree which he could be entitled to would be a general account and settlement of

all the concerns and business of the firm, the conversion of the assets into money—the payment of the joint debts—and the distribution of the balance according to the rights and equities of the partners—thus stepping into the shoes of the debtor partner to the extent of the interest and no further, that he had acquired by the sale. No one has ever pretended that he thereby became a partner and entitled to an account of the profits merely from the time his title accrued. These points have not been raised and discussed either in the Court below or in this Court, and we give no opinion upon them. They are mentioned only to preclude any inference from silence.

Let us assume, however, that the plaintiff by his purchase of Hamilton Whigham's title became absolute tenant in common of the chattel with the other partners. The master reports as an undisputed fact that before the date of the execution Hamilton Whigham had sold his interest to the appellant, that this sale was *bona fide* for a valuable consideration, and that there was no actual fraud. The ground then of the decree below could only have been legal fraud—that there was no sufficient delivery of possession accompanying and following the sale. Now this chattel was in the possession of Andrew Taylor, one of the copartners. By the express terms of the partnership he was the general business agent and superintendent of the business. He was notified of the transfer to the appellant. Whether the appellant became a partner or not is immaterial. The business continued to be carried on under the old firm name. The possession of one tenant in common is the possession of all. What delivery could the appellant have required? The tenant in common in possession recognized his title. Had he commenced an action of replevin with no evidence of an actual ouster he must have been defeated: Morris on Replevin, 113; in Field *v.* ———, 4 Ves. 396, in the Court of Exchequer, Chief Baron McDonald, after laying down the general position "that the *corpus* of the partnership effects is joint property; and neither partner separately has anything in that *corpus*, but the

interest of each is only his share of what remains after the partnership accounts are taken;" adds "that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be available or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts." This passage has been quoted with approbation by LEWIS, J., in Baker's Appeal, 9 Harris, 82, citing in confirmation of it Deal *v.* Bogue, 8 Harris, 288. If then, when the appellant gave notice to Andrew Taylor of his purchase and obtained from him an acknowledgment and recognition of his title, he had done everything which he could do and had no legal remedy to enforce any other delivery; it is clear that he ought not to lose what he had acquired by a fair purchase, and that the rule which requires that an exclusive possession should be delivered to him has no application.

Decree reversed, and now it is ordered and decreed that the bill be dismissed at the costs of the appellee.

Wentworth's Lindley, 334, 343, 700; Collins's Appeal, 107 Pa. St. 590; Whittle *v.* Skinner, 23 Vt. 531; Wallace's Appeal, 104 Pa. St. 559.

C. REMEDIES.

1. AT LAW.

CHADSEY *v.* HARRISON.

Supreme Court of Illinois, 1849.

11 Ill. 151.

THIS was an action of assumpsit, brought by Chadsey against Harrison, in the Schuyler Circuit Court, and a trial was had at the March Term, A. D. 1848, before the Mr. Justice PURPLE, and a jury, when a verdict was rendered in favor of the defendant, for $150.08½.

The declaration contained three counts: the first a special one, and the others general *indebtatus* assumpsit counts. The special count was in substance as follows:

"For that whereas the said Harrison, Chadsey, and one Jonathan D. Manlove, heretofore, to wit, on, etc., at, etc., associated themselves together for the purpose of building, fitting out, and sending down the Illinois and Mississippi rivers, a large raft of saw logs, to be sold at the city of St. Louis, Mo., on the joint account of the said Harrison, Chadsey, and Manlove; each to share and share equally in the profits and loss of said adventure And the said Chadsey avers, that at the special instance and request of Harrison and Manlove, he, the said Chadsey, at the time and place aforesaid, undertook and agreed to superintend the fitting out, building, and carrying down of said raft, and the selling of the same at the city of St. Louis aforesaid. And the said Chadsey further avers, that, in furtherance of the object of the association aforesaid, and of the request and agreement aforesaid, he, the said Chadsey, afterward, to wit, on, etc., at, etc., did superintend the fitting

out and building of the raft aforesaid, and carried the same down the Illinois and Mississippi rivers aforesaid, to the city of St. Louis, and paid all the expenses attendant upon the same, and then and there sold the said raft, upon the joint account of the said Harrison, Manlove, and Chadsey. And the said Chadsey further avers, that the adventure aforesaid resulted in a net loss to the said Harrison, Manlove, and Chadsey of the sum of $231.98, over and above the proceeds arising from the sales of the said raft. And the said Chadsey avers that the said Harrison and Manlove, each, by reason of the premises aforesaid, became liable to pay to the said Chadsey the sum of $77.32\frac{2}{3}$, being their respective proportionate shares of the loss incurred by reason of the adventure aforesaid, and paid by the said Chadsey as aforesaid. And the said Chadsey further avers that the said Harrison afterward, to wit, on, etc., at, etc., in consideration of the premises aforesaid, undertook and promised to pay to the said Chadsey the said sum of $77.32\frac{2}{3}$, when he, the said Harrison, should be thereunto afterward requested," and concludes with the usual assignments of breaches.

To the special count above set forth, the defendant demurred, and there was a joinder in demurrer, and the Court sustained the same. To the residue of the declaration the defendant pleaded the general issue, set-off, and several other pleas which it is unnecessary to set out.

The only error relied upon is, the judgment of the Circuit Court in sustaining the defendant's demurrer to the special count of the plaintiff's declaration.

Opinion by TREAT, C. J.:

The principle is well settled that partners cannot sue each other at law for any matter relating to the partnership concerns, unless there has been a final settlement between them, a balance ascertained, and an express promise to pay the balance: Gow. on Part. 74; Westerlo *v.* Evertson, 1 Wendell, 532; Foster *v.* Allenson, 2 D. & East. 480; Davenport *v.* Gear, 2 Scammon, 495.

The first count of the declaration, after stating the formation and nature of the partnership, simply alleges that the plaintiff paid the expenses of constructing the raft, and taking it to market; and that the net loss on the adventure exceeded the proceeds of the sale $231.98; one-third of which amount the defendant agreed to pay him. This count fails to show a full adjustment of the partnership affairs. Manlove, one of the partners, was not a party to it. Two partners cannot state an account that will bind the third. All must concur in the settlement; and it must embrace all of the partnership transactions. The settlement between the plaintiff and defendant, if any was ever made, was partial in its operation. It related only to the expenses and proceeds of the raft, and did not extend to the capital stock, and the debts due to and from the firm. We are clearly of the opinion that this count of the declaration shows no cause of action. The promise to pay was not founded on a sufficient consideration—a general adjustment of the partnership concerns.

The Circuit Court decided correctly, in sustaining the demurrer, and the judgment will be affirmed, with costs.

Judgment affirmed.

Wentworth's Lindley, 567; Phillips *v.* Blatchford, 137 Mass. 510; Fisher *v.* Sweet, 67 Cal. 228; Learned *v.* Ayres, 41 Mich. 677; Bullard *v.* Kinney, 10 Cal. 60; Bowzer *v.* Stoughton, 119 Ill. 47.

Wycoff *v.* Purnell.

Supreme Court of Iowa, 1860.

10 Ia. 332.

In February, 1857, plaintiff and defendant formed a copartnership in the grocery and provision business in the city of Keokuk, each of said partners agreeing to furnish his share of the capital stock and share equally in the profits of their firm business. The copartnership thus formed was dissolved in December, 1857. The stock in trade was sold and placed to the credit of plaintiff on the partnership account. The

plaintiff in his petition avers that the defendant failed to furnish his share of the capital for the said firm; that he drew out of the said firm more than his just share of the profits, and that upon a settlement and account stated between plaintiff and defendant there was due from defendant to plaintiff the sum of $1,109, for which sum the plaintiff sues. Defendant demurred to plaintiff's petition, which demurrer was sustained by the Court and judgment entered thereon, from which plaintiff appeals.

BALDWIN, J. The defendant demurred to the petition of plaintiff, and assigned as cause of demurrer, that the petition showed that it was a controversy for the settlement of partnership matters, and its subject-matter was one of exclusive chancery cognizance; also that an action at common law would not lie for the matters and things set up in the petition.

It is contended by counsel for appellee that one partner cannot sue another at law for an unsettled account, and that chancery has exclusive jurisdiction of unsettled matters between partners. Upon this point there is no controversy.

But it is also claimed by appellant that the principle is fully and clearly settled that one partner can maintain an action at law against his copartner upon an amount found to be due him upon settlement, and account stated. We think the current of authorities show this to be the proper and settled rule. While in some Courts it has been held that upon a settlement of partnership accounts, an express promise to pay is essential to support an action, yet in most of the States it has been held that where there has been a settlement and balance ascertained, the law itself will imply a promise to pay: Collyer on Partnership, §§ 278, 279, 280, and note; Story Eq. Jur., § 644, and note.

Whether this is a suit at law to recover upon a promise by defendant, either express or implied to pay a balance ascertained to be due upon settlement, or a proceeding to recover an amount unliquidated between partners, must be determined by the language of the petition. It is averred in the petition

that the partnership had been dissolved; that the property of the firm had been disposed of, and upon a settlement and account stated, there was due from the defendant to plaintiff the amount claimed in the petition.

We think that the plaintiff shows by his petition, under a fair and natural construction, a cause of action properly maintainable in a Court of Law. That while the petition is defective in not setting forth fully the character of the settlement of the partnership business, yet it shows also that the partnership was ended; that the account between the plaintiff and defendant, as partners, was no longer a matter of controversy; that the amount sued for had been agreed as due to plaintiff; which, if established by evidence the plaintiff had a right to recover.

Judgment reversed.

Wentworth's Lindley, 562; Pope *v.* Randolph, 13 Ala. 214; Chamberlain *v.* Walker, 10 Allen, 429; Purvines *v.* Champion, 67 Ill. 459; Mount *v.* Chapman, 9 Cal. 294; Cochrane *v.* Allen, 58 N. H. 250.

Law courts take cognizance of certain classes of cases arising between partners: (1) Breaches of the contract to be a partner or for failure to perform acts to launch the partnership: Hill *v.* Palmer, 56 Wis. 123; (2) Breach of express promises between the partners: Sprout *v.* Crowley, 30 Wis. 187; (3) Breach of contract independent of partnership: Mullany *v.* Keenan, 10 Ia. 224; (4) Torts: Pierce *v.* Thompson, 6 Pick. 192.

In general on above topics: Wentworth's Lindley, 562–569, n.

2. AT EQUITY.

a. For an accounting.

Bracken *v.* Kennedy.

Supreme Court of Illinois, 1842.

4 Ill. 558.

Caton, Justice, delivered the opinion of the Court:

This was a *bill in chancery* filed in the La Salle Circuit Court, by the complainant against the defeudants, for an account among partners. The bill states that in July, 1837,

the complainant and defendants entered into partnership as canal contractors, and, as such partners, contracted with a canal company in Virginia, for the construction of section 120 of their canal, and that they completed said section 120 in August, 1838. That during the progress of the work, the complainant and Brady had the principal management of its construction, while most of the time Kennedy was absent. That at the same time Kennedy had an individual contract for the construction of sections 118 and 119 of the same canal, and Kennedy employed the complainant to superintend the completion of these sections. That this individual contract of Kennedy was unprofitable, and, in the course of its progress, became indebted to the copartnership section, 120, to about $8,000, for work and labor expended on sections 118 and 119. That the whole estimate for the company section, 120, was $32,320.90, including the work done on Kennedy's individual sections, and that the costs of the same were $23,783.82, leaving a balance of profits to be divided among the partners of $8,437.08. That the complainant has accounted with and paid over to Brady his third of said profits; and that there is now due from Kennedy to the complainant the sum of $3,959.03, arising from said partnership transactions. That Kennedy has drawn estimates on the works, and has drawn his last on his individual contracts. That no account has been taken or rendered between the said partners, and that Kennedy refuses to account. The bill prays that an account may be taken, etc.

To this bill a demurrer was filed, which was sustained, and the bill dismissed.

The first assignment of error is upon the decision of the Court in sustaining the demurrer, and this is the principal question in the case.

In matters of controversy or difficulty between partners, it is now most usual, and by far the most convenient, to resort to a Court of Equity for their final adjudication and settlement. The practice of this Court is much better adapted to unravel, and definitely settle such complicated questions as frequently arise among partners than a Court of Law; and it is now one

of the most usual proceedings to be met with in Courts of Equity. It is not unusual that almost the entire proof of the merits of a case between partners is locked up in the bosoms of the parties themselves, or is contained in books and papers in the possession of one or the other party, and this Court can afford the only key to the disclosure of the one, or the production of the other. Here, either party may compel the other to purge his conscience, on oath, and declare the truth; and the Court will compel the production of all such papers and books as may be necessary to elucidate the rights or liabilities of the parties. It is for this reason, also, that Courts of Equity have frequently exercised a concurrent jurisdiction with Courts of Law, in long and intricate accounts, running on both sides, between parties who are not partners, and have no interests in common.

It is true that Courts of Law still pretend to afford a remedy in case of difficulty between partners, by the action of account, but it is so incomplete and unsatisfactory that it is now nearly obsolete; and the complaining partners almost universally lays his complaint before a Court of Chancery, where he finds a prompt and efficient remedy, from the superior facilities which it possesses of doing complete justice between the parties.

In a bill of this character, the existence of the partnership, the transaction of business by the firm, and no account among its members, are prominent features, and where they all appear, I am not prepared to say that the bill ought not in all cases to be retained. In this case, the bill shows that there was a special and limited partnership, the particular object of which is stated in it, as well as the nature and amount of the business transacted by the firm, and that no account has been had between the complainant and the defendant Kennedy, who refuses to account. Here, then, is such a case as requires the interposition of a Court of Chancery, to settle and adjust the rights and claims of the several partners. It is true that the bill states that the complainant and Brady have settled as between themselves, and that the complainant has succeeded to all of the rights and interests of Brady in the partnership

business; but this does not make it the less necessary that an account should be had between the complainant and Kennedy, to settle their respective rights; and to accomplish this, it was necessary to make Brady a party to the bill. The bill also states that the partnership advanced to Kennedy, one of its members, in work and labor, etc., to the amount of some $8,000, which is nearly the extent of the whole partnership profits, thus showing substantially that Kennedy had received nearly all of the profits of the work on section 120. In what way could this be recovered back by the other members of the firm, or in what way could he be compelled to account for these advances, unless by the mode here adopted? One member of a partnership cannot sue the firm at law for advances made by him to the joint concern; nor can the firm sue an individual partner for anything that he may have drawn out of the joint stock, or proceeds, no matter how much more than his share it might have been; and the reason is that one man cannot occupy the double position of plaintiff and defendant at the same time.[1] The aid of this Court is just as necessary to settle the account of these advances, as it is to settle the accounts arising out of the immediate transactions of the special business of the partnership.

The bill then being sufficient in substance, although not so particular as might be desirable, the demurrer should have been overruled. This disposes also of the second error.

The third error questions the right of the defendant to file a demurrer, when he was under a rule to answer. This he had a right to do. The filing either an answer, plea, or demurrer was a compliance with the rule. Had the defendant asked further time to answer, and upon that special application had it been granted him, it might have been improper to file a demurrer, without the leave of the Court; but even had such been the case, it would be too late now to raise the objection.

The decision of the Court below is reversed, and the cause remanded, with directions that the complainant be permitted

[1] 1 Story's Eq. 616.

to amend his bill, if he thinks proper, and with leave for the defendant to answer.

Decree reversed.

Wentworth's Lindley, 492 *et seq.;* 1 Story, Eq. Jur. 666; Niles *v.* Williams, 24 Conn. 279; Cox *v.* Volkert, 86 Mo. 505; Gillett *v.* Hall, 13 Conn. 426; Lilliendahl *v.* Stegmair, 45 N. J. Eq. 648.

Lascombe *v.* Russell.

High Court of Chancery, 1830.

4 Sim. 8.

The plaintiffs and the defendants were copartners, as carriers on the Western Road, under articles of copartnership, for seven years from the 1st of July, 1822, "and so from seven years to seven years, till determined by notice." The first period of seven years having expired, and no notice of dissolution having been given, the partnership was continued for another period of seven years, of which one year had elapsed at the time when the bill was filed. It charged that the defendants were indebted, to the plaintiff, in respect of the profits of the partnership received by them, and prayed for an account of the dealings and transactions of the partnership from the foot of an account which had been settled on the 30th of June, 1827, that the defendants might account for all the moneys received by them, from the partnership business, since that time, and that the plaintiff's share of such moneys, after paying the partnership debts and making all just allowances, might be paid to him. The defendants put in a general demurrer.

Mr. Knight and *Mr. Wright*, in support of the bill. The doctrine that a bill to have copartnership account taken, will not lie, unless a dissolution is prayed, has been frequently recognized by Lord Eldon: Forman *v.* Homfray,[1] Marshall *v.* Colman,[2] Kinder *v.* Taylor.[3] At the time of the master sign-

[1] 2 V. & B. 329.
[2] 2 J. & W. 266.
[3] Not yet reported.

ing his report, an event might happen which would totally change the balance. How is the stock to be valued? At what period is the account to stop? If there has been no breach of duty on the part of the defendants, the plaintiff has nothing to complain of; if there has been a breach of duty, he may ask for a dissolution.

The *Solicitor-General* and *Mr. Campbell* in support of the demurrer. No case deciding that accounts of this sort may not be taken, can be produced; there are *dicta* only to that effect. It appears, from the brief in Forman *v.* Homfray, with which we have been furnished, that the plaintiff there prayed for an account which was to be continued until the end of the term of the partnership. In Marshall *v.* Colman the bill prayed for one of the strongest injunctions, and for interim management, which could not be granted without asking for a dissolution. Kinder *v.* Taylor does not all embrace the point. In the case now before the Court, the plaintiff would not have been warranted in asking for a dissolution, for the case made is not one of exclusion, or of receiving what the defendants ought not to have received, but of mere withholding of payment. The only ground for asking for a dissolution, is exclusion or mismanagement. The plaintiff's only remedy is to come into a Court of Equity for an account and payment of what is due to him. The account cannot be taken at law. There is no difficulty in limiting the account to the time when the bill was filed; there are times fixed, by the articles, at which the accounts are to be taken and the balances are to be paid. It is a past wrong that the plaintiff complains of. The defendants ought to have paid the balances found due on each settlement of the accounts. It is not the capital, but the current profits of the partnership that this bill relates to. Harrison *v.* Armitage,[1] and Knowles *v.* Houghton[2] are authorities in support of the present bill.

This question is not a proper one to be decided on demurrer.

[1] 4 Madd. 143.
[2] 11 Ves. 168.

The bill prays for general relief: and, therefore, at the hearing, the plaintiff may ask for everything that is incidental to the account, and, consequently, for a dissolution.

The VICE-CHANCELLOR. I take this to be a bill which purposely avoids the prayer for a dissolution; and that it was not in the contemplation of the plaintiff that the partnership should be put an end to. It would, therefore, be a surprise upon the parties to this record, if I were to deal with it as if a dissolution were sought. Here the partnership is still subsisting; and the bill is filed for an account merely of the dealings and transactions of the partnership.

With respect to the law of this Court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of a partnership. The opinion of Lord ELDON upon this subject has been, from time to time, expressed both before and since the decision of Harrison *v.* Armitage. Suppose that the Court would entertain a bill like the present, and direct an account to be taken of the dealings of a partnership, and that it appeared, by the master's report, that a balance was due from the defendant to the plaintiff; then, upon further directions, the plaintiff would ask for an order that the balance might be paid to him: it would, however, be competent to the defendant to file a supplemental bill, in order to show that, since the account was taken, a balance had become due to him from the plaintiff, after giving the plaintiff credit for the amount found due to him by the master: and thus the matter might be pursued with endless changes, and supplemental bills might be filed every year that the partnership continued, and a balance would never be ascertained till the partnership expired, or the Court put an end to it.

This Court will not always interfere to enforce the contracts of parties; but will, in some instances, leave them to their remedy at law; as in the cases of agreement for the purchase of stock or for the building of houses. With respect to occa-

sional breaches of agreements between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter: but when it finds that the acts complained of are of such a character as to show that the parties cannot continue partners, and that relief cannot be given but by a dissolution, the Court will decree it, although it is not specifically asked. Here a dissolution is not prayed for; and, if the Court were to do what is asked, it would not be final.

Having regard then to the opinion expressed by Lord ELDON both before and after the decision in Harrison *v.* Armitage, my settled opinion is that this bill cannot be maintained; and, therefore, the demurrer must be allowed.

Wentworth's Lindley, 495; Clark *v.* Gridley, 41 Cal. 119; Davis *v.* Davis, 60 Miss. 615.

A partial accounting or an accounting without a dissolution will be permitted in some cases: Wentworth's Lindley, 495.

1. When the partnership agreement calls for periodical settlements or the settlement of distinct transactions: Patterson *v.* Ware, 10 Ala. 444; Wadley *v.* Jones, 55 Ga. 329; Denver *v.* Roane, 99 U. S. 355.

2. To enable a partner to obtain his share of clandestine profits: Society *v.* Abbott, 2 Beav. 559; Beck *v.* Kantorowicz, 3 Kay & J. 230; Traphagen *v.* Burt, 67 N. Y. 30; Fawcett *v.* Whitehouse, 1 R. & M. 132; Hichens *v.* Congreve, 1 R. & M. 150.

3. Where one partner expels or excludes another for the purpose of driving him to a dissolution: Wentworth's Lindley, 496, 497; Harrison *v.* Armitage, 4 Mad. 143; Blisset *v.* Daniel, 10 Hare, 493.

4. When the partnership has proved a failure and the partners are too numerous to be made parties to the action, and justice can be done: Wentworth's Lindley, 499; Richardson *v.* Hastings, 7 Beav. 323; Coville *v.* Gilman, 13 W. Va. 314.

SHARP *v.* HIBBINS.

Court of Chancery of New Jersey, 1887.

42 N. J. Eq. 543.

THE CHANCELLOR. Sharp and Hibbins were partners in business, in Orange, in this State. The copartnership began in 1872 and was dissolved by mutual consent in 1877. Sharp

brings this suit against Hibbins and his wife to obtain from the former an account of the partnership affairs and assets which at the dissolution of the copartnership were left in his hands, and to charge the real estate of Mrs. Hibbins with moneys which, according to the allegations of the bill, were taken by Hibbins from the funds of the firm and expended upon that property in paying interest upon a mortgage thereon and improving the property with buildings, etc. That the complainant is entitled to the account which he seeks there can be no question. The proof is that Sharp and Hibbins were copartners from August 1, 1872, to January 20, 1877; that at the dissolution of the copartnership all the assets were, as before stated, left in the hands of Hibbins, upon an agreement on his part with Sharp that he would settle the affairs of the concern. He has acted under that agreement, has disposed of the property, collected the debts due to the firm, and has, as he alleges, paid debts due from it, but he has never accounted with Sharp in the matter. It is urged on his behalf that he should not be required to account, because it appears by his testimony that he has paid out much more for the firm in the payment of its debts than he has received from the assets. Sharp is entitled to an accounting notwithstanding this claim. The Court will not, in such a case as this, take the account at the hearing; the only material evidence on this part of the case is that which bears upon the question whether the complainant is entitled to an account or not: Gres. Eq. Ev. 240; Hudson *v.* Trenton Locomotive Works, 1 C. E. Gr. 475.

The claim to a lien upon the separate property of Mrs. Hibbins is not established. There is no proof that the property was not hers *bona fide*. Nor is there any proof of fraud on her part. If her husband expended money drawn by him from the firm's funds in improvements upon her land and in the payment of interest upon the mortgage upon the property, there is no proof that it was done surreptitiously, but, on the contrary, it would appear that it was done with the knowledge of the complainant. The expenditure for the greenhouses built on her land appears to have been made in 1873, and

the payments of interest upon the mortgage were made half-yearly, from November 25, 1872, down to April 10, 1876. The money drawn for those purposes was drawn by Hibbins upon his own account from the firm's bank account. It is true they were not charged to him, but the reason was that neither the complainant nor Hibbins kept any account of the moneys drawn by them for their own account except the checks themselves by which they were drawn. There is neither charge nor evidence of fraud in these matters. The complainant is entitled to no lien upon Mrs. Hibbins' property. As to her, the bill should be dismissed with costs.

CHANNON *v.* STEWART.

Supreme Court of Illinois.

103 Ill. 541.

IN December, 1877, appellants, who were doing business in Chicago in the ship-chandlery business, wishing to add to their business a sail-making branch, employed appellee to take charge of and manage the sail-making branch of the business. His compensation, by their agreement, was to be a salary of $700 a year and one-half of the net profits accruing from the sail-making. This contract was for one year—1878. He entered upon his duties and continued without further express contract until February 1, 1880, when by consent he left their service. They had had no full settlement, and in trying to settle, a dispute arose as to certain expenses incurred by appellants, which they claimed inured to the advantage of the sail-making business as well as to that of the ship-chandlery business, and a part of which they insisted should be charged to the sail business as expenses, in fixing the amount of net profits, of which appellee was entitled to one-half.

This is a suit in chancery, brought by appellee, for a settlement of the accounts between him and appellants, and especially for an adjustment of the amount of the profits in the sail-making business, one-half of which, it is conceded, is to be

paid to him as a part of the compensation of his services. Issues were formed, and the cause referred to the master to take proofs and state an account. The master's report, stating the accounts in detail, was filed. Exceptions to the report were overruled, and a decree rendered in favor of appellee for $2,120.55, and that the outstanding debts, amounting to $119, be sold by appellants, and one-half the proceeds be paid to appellee. Defendants appealed to the Appellate Court, where the decree was affirmed, and they bring the record here for review.

Mr. Justice DICKEY delivered the opinion of the Court:

It is insisted that a Court of Chancery has not jurisdiction in this case. It is said appellee was not a partner with appellants, and hence the case does not fall under the head of accounts between partners, and that there is not any such complication of accounts as might otherwise call for the intervention of a Court of Chancery. It is true appellee was not a partner with appellants, but to ascertain his true compensation it is necessary to adjust the accounts of the partnership of appellants, for the amount of the net profits of that business must be ascertained before the true amount of the compensation of appellee can be fixed. Every reason for the adjustment of the accounts between partners, in a Court of Chancery, applies with equal force in this case, and we think the subject-matter is a fit subject for a Court of Chancery.

As to the merits of this controversy, after a careful examination of the record we are not convinced that any error has been committed by the Court by which any wrong has been done to appellants. The controversy relates chiefly to questions of fact. A discussion of the items in detail could subserve no useful purpose. We content ourselves in saying that we find no cause for disturbing the decree.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Wentworth's Lindley, 493; Hargrave *v.* Conroy, 19 N. J. Eq. 281; Hallett *v.* Cumston, 110 Mass. 32; Clark *v.* Gridley, 41 Cal. 119; Harvey *v.* Varney, 98 Mass. 118.

b. For Injunctions and Receivers.

NEW *v.* WRIGHT.

Supreme Court of Mississippi, 1870.

44 Miss. 202.

PEYTON, C. J. It appears from the record in this case that Charles B. New and Charles A. Wright, on the 13th day of July, 1865, formed a partnership in the mill and lumber business, for the term of five years from that date.

The bill of complaint of Charles B. New, filed in the Chancery Court of Jefferson County, on the 19th day of March, 1869, states that he was possessed of a large tract of land in said county of Jefferson, commonly called his "Buena Vista" plantation, on which was a great number of cypress trees, well suited and valuable for the purpose of being sawed into lumber, and that on said tract there was a valuable site for a saw-mill, convenient to said cypress timber, and to the Mississippi River, for shipping lumber from such mill site, and that on said place he had material and machinery suitable for the construction of a saw-mill in part. That by the terms of said partnership, the said Charles A. Wright was to use the cypress timber on said tract of land, for the said term of five years, to such an extent as might be necessary to carry on the saw-mill and lumber business, and to dispose of the same according to the terms of the contract of partnership; that complainant was to allow said Wright, the use of the machinery then on said place as part of the machinery of said saw-mill, to be erected by said Wright, on said mill site, as soon as was practicable, and he was to place therein circular saws, and also machinery necessary and usual for the purpose of sawing lumber, personally to superintend the construction of said mill, the arrangement of the machinery, the hiring of laborers, and to defray all expenses incurred in the building of the mill, the purchase of machinery, wages of laborers, and all other expenses incident to the running of the said mill, and for which the complainant was not in any way

to be responsible. But one-half of the sum thus expended in the construction of the mill, the purchase of the machinery, and the hire of labor by the said Wright is to be paid him, and one-half of the machinery, other property and labor furnished by complainant, to be paid to him out of the proceeds of the first sales of lumber, sawed in said mill, and when such payments were so made to the said parties, the mill and machinery should be the joint property of the complainant and said Wright, who was to continue to run the mill, and the profits resulting therefrom to be equally divided between them; that complainant was not to be liable for any of the debts contracted by said Wright, in the purchase of machinery, hiring of labor, running the mill, or in any other manner whatever.

The bill states that complainant was in part paid for his half of the machinery, materials and labor furnished by him in the erection of said mill, and that said Wright was also paid his entire half of the outlay in the purchase and erection of machinery, labor and materials in building said mill. And when these several outlays were paid to complainant and said Wright out of the proceeds of the sales of the first lumber sawed, the said mill was to be run by the said Wright as their joint property, at his sole expense, and that complainant was entitled to one-half of the proceeds of the lumber sold; that by the terms of the partnership the complainant's capital, to wit: the mill site and cypress timber, were to be set-off against the services of said Wright and expenses of running said mill and selling the lumber made thereat, for which complainant was to be in no manner bound, and that he is entitled to one-half of the proceeds of all the lumber sawed by the said mill, and sold by the said Wright, and to one-half of the lumber remaining unsold; and notwithstanding said mill has been constantly engaged in sawing lumber ever since the same went into operation until the present time, and is still engaged in sawing, and large quantities of lumber sawed therein have been sent to market, and sold by said Wright, and the money therefor received by him, and

that he is still engaged in sawing and selling the lumber, the products of the said mill, he has hitherto wholly failed to account with complainant for his share of the products of said mill, or of the proceeds of the sales of said lumber, or to pay one cent thereof to complainant, except as before stated, as part of the one-half interest of the complainant in the machinery, labor and materials furnished in the erection of said mill; that complainant has in vain sought a settlement of his share of the said proceeds with the said Wright, who pretends that the expenses of running said mill consumed all the proceeds of the sales of the lumber, and that more money is paid for the running of said mill, in outlay for labor and other pretended charges and expenses, than the amount of the sales of lumber sawed by said mill, and in excess of such proceeds of lumber, to the sum of several thousand dollars; that there is due complainant, as his share of the proceeds of the lumber sold from said mill by said Wright, a large sum of money, subject to no abatement for expenses incurred by said Wright in running said mill, and the precise amount of which can only be ascertained by referring the whole matter to a master or commissioner of the Court to take and state an account of the sum due complainant; that neither party, in entering into the partnership, contemplated any other use of the said mill than to the cypress timber on said tract of land on which it was erected, and the sawing of no other timber on any other tract of land or grown elsewhere; and the said Wright, in violation of the contract of partnership, and without the consent of complainant, has ceased to procure cypress timber from the said "Buena Vista" tract of land of the complainant for the use of said saw-mill thereon, and has been for some time heretofore, and now is procuring other cypress timber from other persons to saw, and is sawing the same into lumber on said mill, and thereby defeating one of the objects the complainant had in view in entering into the partnership, to wit: to turn his own cypress timber into productive capital; and that such provision justifies a dissolution of the partnership, and winding up the business thereof.

The bill further charges that said Wright, upon a fair settlement of said business, will be found in debt to complainant in an amount so large that he will not be able to pay the same, unless the stock of timber now on hand at said mill or elsewhere belonging to the said Wright, procured from others, and lumber on hand in which he has half interest, and the interest he has in said mill, would be sufficient to pay and satisfy such indebtedness, and which complainant does not believe, and that he is in danger of losing a portion of what is due him. He therefore prays for an injunction to restrain the said Wright and his agents from removing any saw logs, cypress, or lumber belonging to said firm, or to the said Wright, out of the jurisdiction of the Court or from said saw-mill, or from selling the same or any part thereof, and that a receiver be appointed to take charge of said business, and that on the final hearing, an account be taken and stated between complainant and said Wright, and if, upon the coming in of said account and the confirmation thereof, the said Wright be found indebted to the complainant, that a decree be made for the payment thereof, and for a seizure and sale of the interest of the said Wright in the said saw-mill, stock, timber, and lumber thereunto appertaining, to an amount sufficient to pay and satisfy said debt, and that said partnership be dissolved and its affairs wound up under the orders of the Court.

On the 29th day of March, 1869, the defendant moved the Court to dissolve the injunction which had been granted in this case on the following grounds: 1st. Because there is no equity upon the face of the bill; 2d. Because no legal bond has been given in this case; 3d. Because the penalty in said bond is wholly insufficient, and the surety therein is insolvent. This motion was sustained by the Court without stating upon what ground, and the injunction dissolved. And at the same term of the Court the complainant moved for the appointment of a receiver, which motion was overruled by the Court; and from these decrees of the Court in dissolving the injunction and overruling the motion for the appointment of a receiver, the complainant appeals to this Court.

It appears from the affidavit of Wright, that the usual sawing of said mill per day in the best running season was at least six thousand feet; and from his testimony upon the hearing of said motions, that since the mill went into operation in September, 1865, he had sold lumber to an amount between twenty and twenty-three thousand dollars, and that the expenses of running the mill were about thirty thousand dollars, and that he had not bought any timber or saw logs himself, but his wife did buy some saw logs and lumber.

The propriety of the action of the Court in dissolving the injunction is impeached by the appellant, and presents the first question for our consideration. The bill of complaint charges that neither party contemplated any use of the said mill than to saw the cypress timber on the complainant's said tract of land, on which the mill was erected, and for the sawing of no other timber, and that the said defendant, in disregard of the terms of the partnership, and without the consent of the complainant, has ceased to procure cypress timber from the said tract of land of the complainant, for the use of the saw-mill thereon, and has been for some time heretofore, and now is, procuring other cypress from other persons to saw, and is sawing the same into lumber on said mill, and thereby defeating one of the objects the complainant had in view in entering into the partnership, and that object was to turn his own cypress timber into productive capital. And this allegation is, to some extent, corroborated by the evidence of the appellee, who testified that his wife bought saw logs and timber. This was using the mill in a manner unauthorized by the terms of the contract of partnership, and would justify an injunction, and together with the loss of seven thousand dollars in running the mill for more than three years, would perhaps authorize a dissolution of the partnership. The injunction, therefore, could not have been properly dissolved for the want of equity on the face of the bill. But it must be conceded that the bond given on obtaining the injunction was clearly insufficient, yet the Court should have

given reasonable time to the appellant to make a new bond, and upon his failure to do so, within the time appointed, the injunction should be dissolved: Rev. Code, 548, art. 58. We think the Court erred in thus dissolving the injunction without giving time to make a new bond.

The remaining question for our decision is, did the Court err in overruling the motion for the appointment of a receiver? "It must be admitted," said the master of the rolls, in Madgwith *v.* Winkle, 6 Beavan, 495, "that when an application is made for a receiver in partnership cases, the Court is always placed in a position of very great difficulty. On the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and on the other hand, if it refuses the motion, it leaves the defendant at liberty to go on with the partnership, at the risk and probably at the great loss and prejudice of the dissenting party. Between these difficulties, it is not very easy to select the course which is best to be taken, but the Court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties."

In order to justify the dissolution of a partnership, on the ground of misconduct, abuse, or ill-faith of one of the parties, it is not sufficient to show that there is a temptation to such misconduct, abuse, or ill-faith, but there must be an unequivocal demonstration, by overt acts or gross departures from duty, that the danger is imminent, or the injury already accomplished: Story on Partnership, 464, § 288. Where a concern of any character or kind, covering a partnership, is broken up by controversial suits, and it is apparent that there can be no agreement between the parties in interest for its continuance, a receiver will be appointed: Williams *v.* Wilson, 4 Sandf. Chan. 379; Edwards on Receivers, 330. And a dissolution of a partnership may be granted and a receiver appointed on account of the gross misconduct of one or more of the parties: 1 Story's Eq. 635, § 672, *a*. To authorize the appointment of a receiver there must be some breach of the

duty of a partner, or of the contract of partnership: Harding *v.* Glover, 18 Ves. 281.

It was the duty of the appellee to take the timber used at the mill, from the tract of land on which it was erected, belonging to the appellant; and the getting timber elsewhere, as alleged in the bill of complaint, was a breach of that duty and of the contract of partnership. And if the mill sawed six thousand feet of lumber per day, and the running of the mill from the fall of 1865 to the commencement of this suit in the spring of 1869, brings the parties in debt seven thousand dollars, as stated by the appellee in his testimony, it would seem to be a business which neither party should desire to continue.

Upon the whole, we are of opinion that the case made by the bill authorizes the appointment of a receiver, and that, therefore, the Court erred in overruling the application therefor.

For the reasons herein stated, the decrees of the Court in dissolving the injunction and overruling the motion for the appointment of a receiver, will be reversed, and the cause remanded for further proceedings in accordance with this opinion, with leave to the appellee to answer the bill within sixty days from this date.

Wentworth's Lindley, 538 *et seq.;* Fairthorne *v.* Weston, 3 Hare, 387; Parsons, 209–224; Stockdale *v.* Ullery, 37 Pa. St. 486; Marble Co. *v.* Ripley, 10 Wall. 339; Dunn *v.* NcNaught, 38 Ga. 179; Wilson *v.* Fitchter, 11 N. J. Eq. 71; Shannon *v.* Wright, 60 Md. 520; Cox *v.* Volkert, 86 Mo. 505; Drew *v.* Beard, 107 Mass. 64.

D. DISSOLUTION.

1. BY EVERY CHANGE IN THE FIRM.

BANK OF MOBILE *v.* ANDREWS.

Supreme Court of Tennessee, 1855.

2 Snead, 533.

CARUTHERS, J., delivered the opinion of the Court:

Joseph I. Andrews, E. L. Andrews, and Z. Andrews, being brothers, had for many years been doing business as partners in the cities of New York, New Orleans, Mobile, and Memphis, under the firm name at New York, "J. I. Andrews & Brothers;" at New Orleans, "Andrews & Brothers;" at Mobile, "E. L. Andrews & Co.;" at Memphis, "J. I. Andrews." On the 30th September, 1843, the partnership dissolved, having large means, as well as heavy liabilities, which were by agreement to be paid by E. L. & Z. Andrews, who still continued the business under the old firm names. The Mobile Bank held the paper of the firm for a large amount, but having notice of the dissolution and withdrawal of defendant, was unwilling to extend the credit by renewals, unless the defendant would still continue to be bound. Whereupon the following instrument was executed and delivered to the Bank:

"NEW ORLEANS, November 13, 1843.

"*To the President and Directors of the Bank of Mobile.*

"GENTLEMEN: The Bank of Mobile holds certain promissory notes of E. L. Andrews & Co., and Andrews & Brothers, of which firms I was a member until the 30th of September last. This is to witness that E. L. Andrews and Z. Andrews,

or either of them, is authorized to sign any notes with the name of the firm in liquidation, for the extension or renewal of said obligations, and I agree to continue my liability on such renewals or extensions as if I yet continued a member of said firms. Yours respectfully,

"J. I. ANDREWS."

"*Witness*, A. DANVERGNE."

At the time of dissolution and the date of the power, the bank held two notes on the firm of Andrews & Brothers; one dated March 8, for $8,640, and the other for $9,504, dated June 7, 1843, both at twelve months. Also, two notes on E. L. Andrews & Co., one for $4,700, dated June 2, and the other for $6,400, dated June 28, 1843. These were renewed and reduced by payments from time to time, until, as is alleged, they resulted in the notes now sued upon, viz.: one on "Andrews & Brothers," for $6,480, at twelve months, dated June 5, 1849, and one on the same for $4,320, at the same time, dated March 4, 1848, and one on E. L. Andrews & Co., at sixty days, dated 23d February, 1848, for $6,175.

Z. & E. L. Andrews continued to do business in the names of the old firms until 1845, when they took in as a partner Thomas Brown, and continued the business in the same name and style, till the death of the Andrews, on the same day in 1849, and after the last renewals.

His Honor, the Circuit Judge, charged the jury that as the introduction of Brown into the firm in 1845, operated as a dissolution, the power given to Z. & E. L. Andrews by the defendant to bind him ceased, and he would not be liable on any paper signed by them after that time, and consequently must succeed in his plea of *non est factum* in this suit. In conformity to this direction there was verdict and judgment for defendant—motion for a new trial overruled, and appeal in error to this Court. Upon the correctness of this legal proposition the case must turn, and it has been elaborately argued here on both sides. In view of the importance of the case, and the somewhat novel principle involved, we have held the

case under advisement since the last term, and received and considered additional briefs at the present term.

There can be no controversy as to the soundness of the legal positions taken by the defendant's counsel, that the death, or retirement of a member of a firm, as well as the introduction of a new partner, operates as a dissolution, and a power given previously to such firm would terminate upon the happening of such event. It is true, also, that after a dissolution, the former partners cannot bind each other by new "contracts" without special authority to use the name of the firm. A renewal of a note existing at the dissolution, by any one member, without other authority, binds him individually only, and not the former partners. But all this does not touch the real difficulty in this case. The question is not as to the correctness of these familiar and well-settled principles, to sustain which it would be unnecessary at this day to enter into an argument, or refer to authorities. But the troublesome point here is as to the proper construction of the power of attorney or letter of credit of November 13, 1843. Upon this point there has been less argument and no authority precisely applicable produced. It is assumed in the charge of his Honor, and by the counsel of the defendant here, as the basis of their argument, that it is power given to the new firm in the old name, consisting of Z. & E. L. Andrews: and if this be so, the consequences which they deduce from the incoming of Brown as to the cessation of the power to bind the defendant, might follow. But on the other hand, if the power to bind him is vested in the brothers, as individuals in any designated name, or mode, the case would be entirely changed, and no such consequences would result from the introduction of Brown. So the whole case must turn upon the construction of the instrument in this respect.

It is very well settled also, as insisted by defendant's counsel, that a power of attorney must be strictly construed as to the extent of the authority conferred, and the principal cannot be bound beyond the limits prescribed by himself.

What then, and to whom is this power given, according to

a strict and fair construction of the writing? Is it to the new firm, or to the members of which it consists as individuals? The defendant was equally bound with his brothers for these three notes, which were executed for money loaned to the firm, and of which he had enjoyed an equal benefit. It was the debt of all, and the bank could have enforced the collection against all without any further extension of time, but for this agreement of the defendant that he would continue his liability to the bank, on the notes they then held, or any new notes his brothers, or either of them, might execute, in "renewals or extensions," in the same manner and to the same extent, as if the dissolution had not taken place, or he had continued a member of the firm. Or, in other words, that the power which his brothers had to bind him, when he was a partner with them, should still continue unchanged as to that particular paper. This was then a personal power given to them as individuals, and not as a new firm, and it was in no way qualified or limited, except as to the subject to which it applied. There were no conditions annexed to it as to the time of its duration, or the changes that might occur in the business, or firm relations of the brothers. It could only expire upon the extinguishment of the debts to which it related, or notice to the bank that he would be no longer bound. He could at any time revoke it by notice, and thus force the liquidation of the debts; or discharge himself from his continuing liability.

Not having done this, but silently permitting the bank to rely upon his unrevoked letter of credit, until the failure of his brothers, it would be monstrous injustice to allow him to escape liability and cast the loss upon the innocent and indulgent creditor. Whether he be regarded as a principal, security, or guarantor, can make no difference, as in either case he would continue bound by the due exercise of the authority conferred until notice given of its revocation. If from the new business associations, their procrastination of payment, declining circumstances, or any other cause, he was unwilling to continue their authority to bind him, it was his duty to

notify the bank of the fact. Nothing less than this could discharge him, or arrest the power communicated.

We therefore think his Honor erred in his construction of this power, and that the defendant is bound for the notes sued upon, if it be satisfactorily established that they were signed by either Z. or E. L. Andrews, and are for what remains due upon the notes referred to in the power of 1843.

Reversed and remanded.

Wentworth's Lindley, 570–586; Parsons, 311; Mudd *v.* Bast, 34 Mo. 465; Morss *v.* Gleason, 64 N. Y. 204; Ross *v.* Cornell, 45 Cal. 133; Clark *v.* Wilson, 19 Pa. St. 414; Waller *v.* Davis, 59 Ia. 103; White *v.* White, 5 Gill, 359.

a. Partnerships at Will.

FLETCHER *v.* REED.

Supreme Court of Massachusetts, 1881.

131 Mass. 312.

MORTON, J. This is a bill in equity brought to settle the affairs of a partnership. The case having been referred to a master, the defendants filed numerous exceptions to his report, which were overruled by a single justice of this Court, and an appeal taken to the full Court.

1. The master finds that the copartnership between the parties was formed by an oral agreement, for an indefinite time, to which finding no exception is taken. A partnership for an indefinite period is in law a partnership at the will of the partners, and either partner may withdraw when he pleases, and dissolve the partnership, if he acts without any fraudulent purpose. It follows that the master rightly ruled that the defendants were not entitled to be allowed for any damages which they contended were caused by the withdrawal of the plaintiff from the firm.

2. The business of the firm was introducing and selling "vapor burners," for which Solomon S. Gray and Allen F. Gray held patents, and which were manufactured by them.

The firm of Whidden, Reed & Fletcher by agreements with said Grays had the exclusive right of introducing and selling them in the Middle and Western States. It undertook to form a corporation in New York for the purpose of carrying on the business in that State and New Jersey; in carrying out this scheme, it sold to certain persons in Albany an undivided half-interest in all the rights it had under its agreements with the Grays in said States of New York and New Jersey, who paid the firm therefor $4,000. The scheme of the parties was to form a corporation in New York with a nominal capital of $200,000, of which the parties in Albany were to have one-half and Whidden, Reed, and Fletcher one-sixth each. At a meeting of the parties in Albany, at which Whidden was present, but without authority to act for Reed or Fletcher, it was voted to assess the sum of $4,000 upon the parties according to the stock each was to have. The parties at Albany paid their part, amounting to $2,000; Whidden paid his part, amounting to $666.66; and Reed paid $120 of his part. It was found that a corporation could not legally be formed in New York upon the basis proposed, and no corporation was ever formed. Some business, however, was carried on in New York and New Jersey, but no profit accrued from it.

Some time after the dissolution of the firm, Fletcher, as he testified, "to try to save something for himself out of this business," paid the Albany parties the amount they had paid, $6,000, and bought, through one Bancroft, the patents of the Grays for the States of New York and New Jersey. The defendants contend that, in adjusting the accounts of the partnership, Fletcher should be charged with this sum of $6,000 as the value of the interest of the firm sold to the parties in Albany. If we assume that, in his attempt to extricate himself from the New York adventure, Fletcher had no right to act in his own interest exclusively, but must be deemed to have acted as trustee for his former partners, he would then only be required to account for any profit he made or might have made out of the transaction. But there was sufficient evidence before the master to justify the finding that he made

no profit, that the interest which he took from the parties in Albany was valueless, and that the transaction resulted in a loss. Such is the fair result of the testimony. The master therefore properly disallowed this claim of the defendants.

3. The master also rightly disallowed the claim of the defendants that, in adjusting the accounts, Whidden should be allowed the assessment of $666.66 paid by him on account of the New York adventure, and Reed the assessment of $120 paid by him. These payments were made by them on their individual accounts, and not on account or for the benefit of the firm.

4. The defendants contend that the plaintiff should be charged $300 for the premium on a draft received by him for $3,000 payable in gold. The master finds upon evidence which is uncontradicted, that the plaintiff has credited the firm with all he received on this draft, including the premium on gold. The defendants also contend that the plaintiff ought not to charge the firm with $180 discount paid by him on certain notes received from Albany. The evidence is that the plaintiff paid this discount, and that at the time the firm was largely indebted to him for advances made by him. He had the right to discount the notes and credit the firm with the net sum received, for the purpose of repaying his advances.

5. One of the defendant's exceptions is to the exclusion by the master of the following question put to S. S. Gray: "What representations were made to you by Mr. Bancroft when he purchased the patent right for New York and New Jersey?" We are inclined to think that Bancroft was so far the agent of the plaintiff that some representations or statements made by him in the course of his agency might be admissible against the plaintiffs. But the question put to Gray is general, calling for all representations made by Bancroft. The difficulty with this exception is that neither the question nor the exception, nor any part of the record before us, shows what the statements of Bancroft which the defendant sought to put in were, or whether they were material and competent.

We cannot hold, as a matter of law, upon this record, that the master erred in disallowing the question.

We have thus considered all the exceptions which the defendants have argued in this Court. We do not think it necessary to discuss the others; it is sufficient to say that, upon the report before us, we see no reason for sustaining any of them. The result is that the exceptions to the master's report are overruled, and a decree according to the findings of the master is to be entered for the plaintiff, the form of the decree to be settled before a single justice.

Decree for the plaintiff.

Wentworth's Lindley, 571 *et seq.*; Carlton *v.* Cummins, 51 Ind. 478; Walker *v.* Whipple, 58 Mich. 476; Howell *v.* Harvey, 5 Ark. 270; Skinner *v.* Tinker, 34 Barb. 333.

b. No Indissoluble Partnerships.

SOLOMON *v.* KIRKWOOD.

Supreme Court of Michigan, 1884.

55 Mich. 256.

COOLEY, C. J. The plaintiffs, who are, in the city of Chicago, dealers in jewelry, seek to charge the defendants, as partners, upon a promissory note for $791.92, bearing date November 9, 1882, and signed "Hollander & Kirkwood." The note was given by the defendant Hollander, but Kirkwood denies that any partnership existed between the defendants at the date of the note.

The evidence given on the trial tends to show that on July 6, 1882, Hollander & Kirkwood entered into a written agreement for a partnership for one year from the first day of the next ensuing month, in the business of buying and selling jewelry, clocks, watches, etc., and in repairing clocks, watches, and jewelry, at Ishpeming, Michigan. Business was begun under this agreement, and continued until the latter part of October, 1882, when Kirkwood, becoming dissatisfied, locked

up the goods and excluded Hollander altogether from the business. He also caused notice to be given to all persons with whom the firm had had dealings that the partnership was dissolved, and had the following inserted in the local column of the paper published at Ishpeming: "The copartnership heretofore existing between Mr. C. H. Kirkwood and one Hollander, as jewelers, has ceased to exist, Mr. Kirkwood having purchased the interest of the latter." This was not signed by any one.

A few days later Hollander went to Chicago, and there, on November 9, 1882, he bought, in the name of Hollander & Kirkwood, of the plaintiffs goods in their line amounting to $791.92, and gave to the plaintiffs therefor the promissory note now in suit. The note was made payable December 15, 1882, at a bank in Ishpeming. When the purchase was completed Hollander took away the goods in his satchel. The plaintiffs had before had no dealings with Hollander & Kirkwood, but they had heard there was such a firm, and were not aware of its dissolution. They claim to have made the sale in good faith, and in the belief that the firm was still in existence. On the other hand, Kirkwood claimed that Hollander and the plaintiffs had conspired together to defraud him by a pretended sale to the firm of goods which the plaintiffs knew Hollander intended to appropriate exclusively to himself; and he was allowed to prove declarations of Hollander which, if admissible, would tend strongly to prove such a conspiracy.

The questions principally contested on the trial were—*First*, whether the acts of Kirkwood amounted to a dissolution of the partnership; *second*, whether sufficient notice of dissolution was given; and *third*, whether there was any evidence to go to the jury of an understanding between Hollander and the plaintiffs to defraud Kirkwood. The trial Judge, in submitting the case to the jury, instructed them that Kirkwood, notwithstanding the written agreement, had a right to withdraw from the partnership at any time, leaving matters between him and Hollander to be adjusted between

them amicably or in the Courts; and for the purposes of this case it made no difference whether Kirkwood was right or wrong in bringing the partnership to an end; if wrong, he might be liable to Hollander in damages for the breach of his contract. Also, that when partners are dissatisfied, or they cannot get along together, and one partner withdraws, the partnership is then at an end as to the public and parties with whom the partnership deals, and neither partner can make contracts in the future to bind the partnership, provided the retiring partner gives the proper notice. Also, that if they should find from the evidence that there was trouble between Hollander and Kirkwood prior to the sale of the goods and the giving of the note; that Kirkwood informed Hollander, in substance, that he would have no more dealings with him as partner; that he took possession of all the goods and locked them up, and from that time they ceased to do business—then the partnership was dissolved. Further, that whether sufficient notice had been given of the dissolution was a question for the jury. Kirkwood was not bound to publish notice in any of the Chicago papers; he was only bound to give actual notice to such parties there as had dealt with the partnership. But Kirkwood was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and on this branch of the case the question for the jury was whether Kirkwood gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note: if he did not, he would still continue liable.

The Judge also submitted to the jury the question of fraud in the sale of the goods. The jury returned a verdict for the defendants.

I. We think the Judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, "is a right in-

separably incident to every partnership. There can be no such thing as an *indissoluble* partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it:" Skinner *v.* Dayton, 19 Johns. 513, 538. To the same effect are Mason *v.* Connell, 1 Whart. 381, and Slemmer's Appeal, 58 Pa. St. 155. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages. And that responsibility would exist in breaking a contract of partnership as in other cases.

II. The instruction respecting notice was also correct. No Court can determine for all cases what shall be sufficient notice and what shall not be: the question must necessarily be one of fact. Publication of notice of dissolution in a local newspaper is common, but it is not the only method in which notice can be given. The purpose of the notice is to make notorious in the local community the fact that a dissolution has taken place; and publication of a notice may or may not be the most effectual means for that purpose. Very few persons in any community probably read all the adver-

tisements published in the local papers; and matters of local importance which are advertised are quite as likely to come to them from other sources as from the published notices.

That publication in a newspaper is sufficient, is not disputed by the defense, provided it appears on its face to be authoritative: Ketcham *v.* Clark, 6 Johns. 144; s. c. 5 Am. Dec. 197; Graves *v.* Merry, 6 Cow. 701; s. c. 16 Am. Dec. 471; National Bank *v.* Norton, 1 Hill, 578; Nott *v.* Douming, 6 La. 680; s. c. 26 Am. Dec. 491; Watkinson *v.* Bank of Pennsylvania, 4 Whart. 482; s. c. 34 Am. Dec. 521; Rose *v.* Coffield, 53 Md. 18; s. c. 36 Am. Rep. 389. But in this case it is said the notice did not appear to be authoritative; it appeared as a local editorial item, and such items are often baseless, and may in any particular case have no better foundation than rumor or even suspicion. They do not bear upon their face the verity which a notice signed by the party would import.

All this may be true without being conclusive. When the purpose is to put the fact of dissolution before the public, it certainly cannot be affirmed that the purpose is more likely to be accomplished by a formal advertisement than by an item in the local column of the newspaper. Many publishers, it is believed, have in their papers a local column in which items appear which seem on their face to be editorial, but which are really advertisements; and not only paid for, but paid at extra rates, for the reason that in that column they would be more likely to be seen and read than if published as advertisements in the ordinary way. When such is the case, a Court could hardly hold as matter of law that the advertisement would be sufficient, but the notice in the local column not. To do so would be to make form more important than the purpose to be accomplished. One who derives knowledge of the fact from public notoriety is sufficiently notified: Bernard *v.* Torrance, 5 Gill & J. 383; Halliday *v.* McDougall, 20 Wend. 81; and probably in many small communities a fact would sooner be made notorious by a notice in the local column of the county or village paper

than in any other way. In a large city it might be otherwise. But all that can be required in any case is that such notice be given as is likely to make the fact generally known locally: Vernon *v.* Manhattan Co., 22 Wend. 183, 193; Lovejoy *v.* Spafford, 93 U. S. 430. When that is done the party giving the notice has performed his duty, and any one contemplating for the first time to open dealings with the partnership must at his peril ascertain the facts. This, in effect, was the instruction given.

III. But we think the Judge erred in receiving evidence of Hollander's admissions or declarations tending to show fraudulent collusion between him and the plaintiffs. The declarations of a conspirator may be evidence against his associates after the conspiracy is made out; but to receive them as proof of the conspiracy would put every man at the mercy of rogues. We find in this case no evidence of the conspiracy except in the statements of Hollander; and those having been erroneously received there was nothing on that branch of the case to submit to the jury.

For this error there must be a new trial.

Blake *v.* Dorgan, 1 Greene, Iowa, 537; Hartman *v.* Woehr, 18 N. J. Eq. 383; Slemmer's Appeal, 58 Pa. St. 155. *Contra*—Berry *v.* Folkes, 60 Miss. 576; Skinner *v.* Dayton, 19 John. 513.

A partnership may be dissolved by the mutual agreement of the members: 3 Kent Com. 53; Wentworth's Lindley, 570; Bragg *v.* Geddes, 93 Ill. 39.

DEATH.

Hoard *v.* Clum.

Supreme Court of Minnesota, 1883.

31 Minn. 186.

Action for an accounting and the winding up of the affairs of a partnership, brought in the District Court for Goodhue County. The plaintiffs in the action are three of the partners and the widow and heirs-at-law of a fourth partner, and the

defendant is the only other partner. The complaint sets out the making of the partnership and recites in full the partnership articles. From these articles, which are dated March 15, 1880, it appears that the partnership was formed, under the name of the Clum Compounding Company, for the purpose of manufacturing and selling a medicine known as the Clum Liver Cathartic, and that the partnership was "to have an existence of thirty years from the date of these articles, unless sooner dissolved by mutual consent." The articles also provide for the taking of inventories at stated times, and that, in case any member of the partnership may wish at any time to dispose of his interest in the business, the other partners are to have the right to purchase such interest by paying its value as determined by the last preceding inventory. The articles then provide that "in case of death of any member of the Clum Compounding Company, the heirs of such member may retain their interest therein, with all the rights and privileges of the original members; and the administrator of his estate, or the executor under his will, shall represent such heir or heirs at the meetings (or otherwise) of said company, so as to share the burden of management; and in the event that this cannot be done, the Clum Compounding Company shall have the right to purchase the interest of such deceased member in the same manner, and for the same amount, as in the case of a member wishing to sell as before stated. Nothing in the foregoing articles is to be construed as meaning that the Clum Compounding Company is compelled to pay at the inventory price, but it simply gives the right to buy on the above-named terms if it chooses to do so; and each party to this agreement hereby grants such right and privilege to buy such retiring or deceased party's interest on above-named terms, the company reserving the right to buy at a better figure and terms if they can." The complaint further alleges the adoption of a resolution, on February 17, 1882, for the discontinuance of business and the dissolution of the partnership, and due notice thereof given to defendant; also the death of one of the partners, on April 1, 1882, and the refusal of each and

all of the plaintiffs to purchase the interest of the deceased partner.

Defendant demurred to the complaint on the grounds (1) that there is a defect of parties plaintiff, and (2) that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled by McCluer, J., and the defendant appealed.

Berry, J. 1. An *excess* of parties is not ground of demurrer as "a defect of parties," in the meaning of Gen. St. 1878, c. 66, § 92, subd. 4; Pomeroy on Remedies, § 206; Richtmyer *v.* Richtmyer, 50 Barb. 55; Allen *v.* City of Buffalo, 38 N. Y. 280; Lewis *v.* Williams, 3 Minn. 95 (151).

2. Three members of a partnership firm and the heirs of a deceased fourth bring this action against the remaining member, for the purpose (1) of having the partnership adjudged dissolved; (2) of having the partnership wound up, and, to that end, an accounting had, a receiver appointed, its assets converted, its debts paid, and the rights of the partners among themselves ascertained and adjusted.

In the absence of previous agreement to the contrary, the death of a partner works a total dissolution of a partnership; that is to say, a dissolution both as respects the deceased and the surviving partners: Pollock on Partnership, § 183; Collyer on Partnership, §§ 103, 106; Story on Partnership, §§ 317, 319 *a;* Marlett *v.* Jackman, 3 Allen, 287; Roberts *v.* Kelsey, 38 Mich. 602; 1 Lindley on Partnership, 231. A simple provision in the articles for the continuance of the partnership for a fixed period, as, in the present instance, for thirty years, is not such an agreement: Collyer on Partnership, §§ 100, 105; Crawford *v.* Hamilton, 3 Madd. 251; Crosbie *v.* Guiou, 23 Beav. 518; Story on Partnership, § 319 *a.* Mining partnerships appear to be governed by somewhat different rules: Jones *v.* Clark, 42 Cal. 180.

In case of such dissolution, the right of surviving partners and of the representative of a deceased partner to have the partnership wound up, and any surplus property

distributed, is matter of course: 1 Collyer on Partnership, § 107.

In the case at bar the partnership was dissolved by the death of the partner Hoard. The articles contain no stipulation for the continuance of the business of the concern, except upon specified contingencies, none of which have occurred, and none of which, therefore, cut any material figure in the case. It follows that the three partners plaintiff can maintain this action against the partner who refuses to recognize the dissolution, and to co-operate in closing up and adjusting the business of the concern. As respects their right to maintain it, it is not important that the heirs of the fourth partner, who are joined with them as plaintiffs, have alleged no facts to show that they are proper parties to the action, nor that the executor or administrator of the deceased is not joined; for no objection, as respects *parties*, has been taken, except that there is a *defect* of parties on account of the joinder of the heirs, and this we have disposed of.

Order affirmed.

The permanent insanity of a partner is ground for dissolution, though it does not itself dissolve the partnership: Wentworth's Lindley, 510 *et seq.*; Rowlands *v.* Evans, 30 Beav. 302; Raymond *v.* Vaughan, 17 Ill. App. 144.

A declaration of war dissolves a partnership existing between residents of hostile countries: Wentworth's Lindley, 582; Matthews *v.* McStea, 91 U. S. 7; Buchanan *v.* Curry, 19 John. 137.

The bankruptcy or insolvency of a partner dissolves the firm, for all subsequent acts of the bankrupt or insolvent are void, and the assignee is not a partner: Wentworth's Lindley, 577; Moody *v.* Rathburn, 7 Minn. 89; Talcott *v.* Dudley, 5 Ill. 427; Marquand *v.* N. Y. Mfg. Co., 17 John. 525.

The partnership is dissolved by the completion of the enterprise for which the partnership is formed: Bohrer *v.* Drake, 33 Minn. 408; Sims *v.* Smith, 11 Rich. S. Car. 565.

The sale of one partner's interest, either on execution or voluntarily, works a dissolution of the partnership: Wentworth's Lindley, 583; Carter *v.* Roland, 53 Tex. 540; Aspinall *v.* London & N. W. R. R., 11 Hare, 325.

2. NOTICE.

Bloch *v.* Price.

United States Circuit Court, 1887.

32 Fed. Rep. 562.

Thayer, J. (*orally*). The suit of A. Bloch against William M. Price, Stephen G. Price, Darwin W. Marmaduke, and Leslie Marmaduke is an action to recover a debt contracted by Stephen G. Price alone, while doing business in the name of Price, Marmaduke & Co. The case as respects D. W. Marmaduke has been disposed of by a ruling made a few days since on his plea of former adjudication, which plea was sustained: *Ante*, 447. The facts on which the decision depends are as follows:

I state the facts as found by the Court from the testimony, some of which are not controverted, while others are in dispute. The firm of Price, Marmaduke & Co. was organized in the fall of 1881, to do a general commission business in the city of St. Louis, Missouri, and was composed of the four defendants last named. D. W. Marmaduke retired from the firm in February, 1882; William M. Price retired therefrom in November, 1882; and Leslie Marmaduke withdrew in November, 1883. Notwithstanding these changes in the *personnel* of the firm, business was transacted continuously in the name of Price, Marmaduke & Co., with the consent of the retiring partners, from the fall of 1881 until August 28, 1885, when S. G. Price, who was then conducting the business on his own account, failed and made an assignment. No public notice of any change in the firm was given until July 1, 1884, when a notice was published for three successive days in two St. Louis daily papers, to the effect that on July 1, 1884, William M. Price, D. W. Marmaduke, and Leslie Marmaduke had sold out all their interest in the firm to Stephen G. Price, and that the latter would thenceforth continue the business. Circulars notifying customers of the dissolution of Price, Marmaduke & Co. were also sent out about July 1,

1884, but my conclusion is that plaintiff did not receive such notice, if in point of fact any such notice was mailed to him.

Plaintiff is a merchant residing and doing business at Minneapolis, in the State of Kansas. In July, 1881, he made a consignment of wool to the firm of William M. Price & Co., St. Louis, Missouri, with which firm defendants William M. and Stephen G. Price were then connected. Some time in June, 1882, plaintiff made a shipment of wool to Price, Marmaduke & Co., which in due course of time was sold by the consignee, and the proceeds duly accounted for. Prior to that shipment, however, and subsequently thereto, during the wool season of 1882, plaintiff received price-currents from the firm of Price, Marmaduke & Co., which purported to be issued by that firm, and in the caption described the firm as composed of William M. and S. G. Price, late of the firm of William M. Price & Co., and of Leslie Marmaduke, and D. W. Marmaduke. By means of the price-currents in question, plaintiff was advised, and at the date of the shipment in June, 1882, supposed that all of the defendants were then members of the firm of Price, Marmaduke & Co., and he received no notice to the contrary in the course of that transaction. During the following wool seasons of 1883–84, and in June, 1885, plaintiff also received price-currents issued by and in the name of Price, Marmaduke & Co.; and was furthermore aware that certain parties residing in his vicinity had made shipments to, and had had transactions with, the firm, although the plaintiff himself made no further consignments to the firm after June, 1882, until June 5, 1885.

After Leslie Marmaduke retired from the firm, in November, 1883, but not before, a change was made in the caption of the price-currents issued by Price, Marmaduke & Co. The change consisted in dropping from the caption the names of the individuals composing the firm as theretofore published, but in all other respects they were identical with those issued when the firm was first organized.

On June 5, 1885, plaintiff being then ignorant of any of the changes that had taken place in the firm of Price, Marma-

duke & Co. since its organization, made a second shipment of 5,355 pounds of wool to that firm. It was sold at auction on July 31, 1885, but the proceeds had not been remitted to the plaintiff at the time of the failure of S. G. Price on August 28, 1885. The purpose of this suit is to charge all the defendants with the payment of the claim. The defendants, William M. Price and Leslie Marmaduke, contend that they are not estopped from denying their liability as partners for the proceeds of the shipment made on June 5, 1885, because, as it is claimed, plaintiff did not know that they were members of the firm, at the date of the first transaction in 1882; that he never in point of fact knew that they were connected with the firm, and consequently did not make the second shipment in 1885, on the supposition that they still continued to be members, or on their credit. In other words, they claim that no act of theirs, or laches on their part, has misled the plaintiff, or induced him to extend credit to the firm of Price, Marmaduke & Co. for the debt sued for.

The law is undoubtedly, as declared in the case of Thompson *v.* Bank, 111 U. S. 536, 4 Sup. Ct. Rep. 689, that a person who was not a member of a partnership at the time a debt is contracted, cannot be held therefor, except for some act of commission or omission that will estop him from asserting as against the particular creditor that he was not a partner when the debt sued for was contracted. But the contention on the part of the two defendants last named is based upon a false assumption of matter of fact. From the evidence produced on the trial of this case in the State Court (when it was there pending) it may have been a fair deduction that plaintiff, when he began to deal with Price, Marmaduke & Co., did not know the names of the persons composing the firm, and never had known; but on the present trial it was shown to my entire satisfaction, by the production of one of the price-currents that had been received by the plaintiff prior to June, 1882, that at the commencement of his dealings with Price, Marmaduke & Co. he must have known and did know, or at least have supposed, that all the defendants were then members of

the firm. While it was not shown on this trial that plaintiff had any special acquaintance with either member of the firm, or knew the financial standing of either, or trusted the firm because any particular person was a member of the same, yet I do not regard such proof as essential to a recovery. When it appears that a person knows who are the members of a firm, and has had dealings with it in the course of which he has extended credit, the presumption must be, in the absence of other proof, that he gave credit to all the persons who were known or represented to him to be partners. And, with respect to all subsequent transactions in which credit is extended to the firm, the same presumption obtains so long as the firm name remains the same, and no notice has been given to the creditor of any change in the *personnel* of the firm. In the present case, therefore, the Court will presume that, when plaintiff resumed dealings with Price, Marmaduke & Co. in June, 1885, he gave credit to all the persons who had been represented to him to be members of the firm in the course of the first business transaction, although he did not expressly testify that in the last transaction he gave special credit to either William M. Price or Leslie Marmaduke.

It is further contended that plaintiff was not entitled to notice of changes in the firm of Price, Marmaduke & Co., because at the date of those changes he had only made the firm one shipment, and that not of a recent date. This is equivalent to saying that when William M. Price withdrew from the firm in November, 1882, and Leslie Marmaduke in November, 1883, the plaintiff occupied the position of a person who had never had any dealings with any member of the firm. This position the Court regards as untenable. When a person has knowledge of the individuals who compose a mercantile firm, derived from business transactions with it, his right to notice of subsequent changes therein cannot be determined or measured by the number of transactions he may have had with the firm, whether one or many. The length of time that has elapsed since a person has had a transaction with a firm before any change occurs therein, may be a proper considera-

tion affecting the question whether such person should be notified of the change. But, considering all the circumstances of the present case, it cannot be said that plaintiff's dealings with the firm in question were so remote from the time changes took place in its membership that the outgoing members were under no obligation to notify him of their withdrawal. In point of fact one of the defendants withdrew within four months after plaintiff's first shipment to the firm, and before the next shipping season. Then, again, the outgoing members knew that the old firm name was to be employed in future transactions, which in itself would be likely to create the impression that no change had taken place in the membership; they were also well aware of the practice that had been pursued of sending out price-currents to merchants and shippers like the plaintiff, who had ever had dealings with the firm, thereby inviting further consignments; and probably understood, as was the fact, that the practice would most likely continue, and that the plaintiff might be thereby encouraged to make further consignments, and to extend further credit to the firm, within a comparatively short period after their retirement.

In any view of the case, plaintiff stood in the relation of a customer of the old firm and a probable patron of those who were to succeed to its business, and in my judgment he was entitled to notice from the outgoing members of their withdrawal. As such notice was not brought home to the plaintiff, and as the evidence in my opinion warrants the conclusion that the last consignment was made on the credit of the old firm (plaintiff being ignorant of any change therein), judgment will be entered against William M. Price, and against Leslie Marmaduke, as well as against the defendant, Stephen G. Price. The amount of the judgment will be $810.96, with interest computed at the rate of six per cent. per annum from August 31, 1885, to the present date.

The record will show that the case was submitted by these defendants, and also by the defendant, D. W. Marmaduke, at the same time, and judgment will go in favor of D. W. Mar-

maduke on his plea of former adjudication, and against the other defendants.

Wentworth's Lindley, 211, 213; Rose *v.* Coffield, 53 Md. 18; Eustis *v.* Bolles, 146 Mass. 413; Duff *v.* Baker, 78 Ia. 642; Meyer *v.* Krohn, 114 Ill. 574; Solomon *v.* Kirkwood, 55 Mich. 256; Stimson *v.* Whitney, 130 Mass. 591; Clement *v.* Clement, 69 Wis. 599; Parsons, 313–324.

Dissolution changes the scope of the agency of each partner; before dissolution it existed for the purpose of carrying on the business, now it exists merely for winding it up, collecting credits, paying off debts and dividends: Wentworth's Lindley, 217–221; Hawn *v.* Land and Water Co., 74 Cal. 418; Bryant *v.* Lord, 19 Minn. 396; Wilson *v.* Greenwood, 1 Swans. 471; Hayden *v.* Cretcher, 75 Ind. 108; Thursby *v.* Lidgerwood, 69 N. Y. 198; Lange *v.* Kennedy, 20 Wis. 279.

3. CONTINUANCE AFTER DEATH.

JONES *v.* WALKER.

Supreme Court of the United States, 1880.

103 U. S. 444.

MR. JUSTICE MILLER delivered the opinion of the Court:

W. H. Walker, who was a large dealer in liquors in partnership with his son Frederick, made his will in July, 1870. One of the clauses of the will provided for the continuance of the partnership and the conduct of this business after his death.

It is in this language:

"It is my wish that my son Frederick carry on the business of W. H. Walker & Co. in that name and style, and in my storehouse where it is now carried on, giving him power to change the place until my youngest child living to be twenty-one years of age arrives at that age, or for a shorter time, if he does not find it profitable. To that end all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable while Frederick carries on said business; my share shall pay the salary of an efficient man to aid him therein or he shall have compensation for his serv-

ices as to and from my share. Agents and employees of the concern are to be paid by it. Frederick is not to be charged with $5,000 advanced by me to him on his coming of age, and he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in said concern and its good-will as will make his share equal to one-half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared in the first of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants, and others. As my personalty is to be divided among them when my youngest child living to be twenty-one years of age arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the business, my interest in the concern and its good-will shall be sold as my executors may direct, and the proceeds divided, as the profits thereof are to be divided, with an obligation, if possible, that the business may be carried on under the old name and style."

The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt by the proper Court.

The appellant Jones was made assignee, and very shortly afterward filed the bill in the present case against the devisees of W. H. Walker's will.

The object of the bill is twofold, namely, to subject the property of the deceased, which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts, and to recover from the defendants money which they had received as dividends out of the profits of the business after the death of the testator.

In the recent case of Smith *v.* Ayres, 101 U. S. 320, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a

partnership, in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that, unless he had expressly placed the whole, or some other part of his estate, under the operation of the partnership, it would not be presumed that he had so intended. See also Burwell *v.* Mandeville's Executor, 2 How. 560; *Ex parte* Garland, 10 Ves. Jr. 109. In the case before us the testator declares, in express terms, that his capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but his other property shall not be so chargeable.

We see no reason in the present case for departing from the principle adopted in Smith *v.* Ayres after much consideration.

If dividends of profits out of the partnership business were honestly and fairly made, and when paid did not diminish the capital, nor withdraw what was necessary to pay the indebtedness of the concern, we see no reason why the persons receiving them should now be called on to refund them.

The will of the testator has a clause authorizing these dividends. The partnership had a long time to run and a large part of his capital was engaged in the business. There were children to be reared and educated, and it would have been very unreasonable that all the profits should be continually converted into capital, and that neither these children, nor Frederick, the other partner, should be permitted to receive dividends of profits, except on the condition of a liability to that extent for any future transactions of the partnership through a period of fifteen or twenty years.

If these dividends had not been declared in good faith, nor really earned, if they had diminished the capital, or if, when they were made, debts existed which would have been left without means of payment, the persons sharing in the dividends would probably have been liable to these creditors to the extent of the money so received.

But we are satisfied that none of these conditions existed.

The case is mainly one of fact, and the testimony is very full. We do not think its discussion here profitable or useful. We are satisfied that at the time the last dividend was made the capital of the company was undiminished, and the firm amply able to pay its debts. Its misfortunes followed after this.

It very fully appears that the insolvency was brought about by accommodation indorsements for others, made after the last dividend was paid; that the firm, but for this, would have remained solvent, and that, in regard to this, none of the defendants were to blame except Frederick, who, being a full partner, is liable personally for all the debts of the firm.

An important matter in the case is a stipulation of the parties to the suit that all the debts owing by the firm were contracted subsequently to the declaration and payment of all the dividends, and none of the debts of the firm were in existence at the time these profits were declared and paid.

No creditor whose debt was in existence when these dividends were made was injured. All the debts then existing have been paid. What right had subsequent creditors to reclaim these dividends, who had no interest in the matter when they were paid? These defendants, except Frederick, were not partners. Their money was in the concern, and they received dividends instead of interest.

We repeat that there is no evidence of fraud or intentional wrong.

Decree affirmed.

Ballantine *v.* Frelinghuysen, 38 N. J. Eq. 266; Exchange Bank *v.* Tracy, 77 Mo. 594; Burwell *v.* Mandeville, 2 How. U. S. 560, 577; Wilson *v.* Simpson, 89 N. Y. 619.

4. SURVIVING PARTNER.

CLAY *v.* FIELD.

United States District Court, 1888.

34 Fed. Rep. 375.

HILL, J. This cause is submitted upon bill, amended bill, answers, exhibits, and proof, from which the following facts appear: In September, 1854, David I. Field and C. I. Field, brothers, residing in the State of Kentucky, formed a copartnership for the purpose of purchasing a cotton plantation in this State, slaves, mules, etc., to be conducted by D. I. Field, who was to reside on the plantation, and control and manage the same. Each party contributed one-half the capital stock, and each was to share equally in the profits and losses. In pursuance to this agreement, a plantation, slaves, mules, etc., were purchased. D. I. Field resided on the plantation, and managed the business up to his death, which occurred in September, 1859. D. I. Field died intestate, and left the defendant (now Mrs. Freeman) his widow, and the defendant, D. I. Field, his only child and heir-at-law. Being then an infant, E. H. Field, another brother, was appointed administrator on the estate of D. I. Field. C. I. Field took the paramount control of the partnership property, but placed said E. H. Field in the immediate possession and control of the property, for the reason assigned by him that the slaves would be better satisfied, and more easily managed. Mrs. Freeman, the widow, then Mrs. D. I. Field, was with her son in Kentucky, when her husband died, and never afterward came to this State. The crop of 1859 was gathered and sold and applied to the payment of the debts of the firm. The business was continued by C. I. Field through the years 1860, 1861, 1862, and commenced in 1863, but C. I. Field [then in possession of the property, real and personal, both as surviving partner, and as administrator of D. I. Field—E. H. Field having resigned his administration, and he having been appointed in his place], being apprehensive that the slaves

would leave and go to the United States army, took all but some of the women and children to Texas, and remained there with them until after the close of the war, when he returned with them, and employed them on the plantation during the year 1866, after which he abandoned the cultivation of the plantation—the slaves having been emancipated, as the result of the war—and leased out the lands for the next year. C. I. Field died intestate the 18th day of July, 1867, when Brutus J. Clay administered upon both the estates of D. I. Field and C. I. Field, and took possession of the lands, and leased them out, until there was an attempted sale of them by him under the decree of the Probate Court of Bolivar County; and they were bid off by the complainant, Pattie A. Clay—she being the only child and heir-at-law of C. I. Field, his wife having died some time before his own death—and who has retained possession of them ever since, except a portion of the same assigned as dower to Mrs. Freeman as the widow of D. I. Field, by decree of this Court. The crop raised in the year 1860 was gathered, sold, and the proceeds applied to the payment of the debts of the firm; that raised in 1861 and 1862 was raised and gathered, but not sold—and was burned by the Confederate soldiers, under orders of their commanders. The mules and other personal property were destroyed, or scattered and lost. The individual property of D. I. Field was sold and applied to the payment of his individual debts, and the support of his wife and child; also they received some support from the partnership assets. C. I. Field being a man of wealth, furnished from time to time money to the firm as its creditor, which appears from the written notes or acknowledgments executed by D. I. Field in the name of D. I. Field & Co.—the firm name under which the firm business was conducted—and which are in the words and figures as follows:

"On or before the 1st day of January, 1858, the concern of David I. Field & Co. will be owing C. I. Field the sum of seven thousand three hundred and eighty-seven dollars and thirty-one cents ($7,387.31), for money advanced the concern,

for payment of the Leach land, and cash advanced for the purchase of negroes in Kentucky, in the summer of 1856, to bear six per cent. interest from maturity to when due. *This 23d day of December, 1856.* D. I. FIELD & Co. [Seal.]"

"The concern of David I. Field & Co. is owing to C. I. Field the sum of five thousand six hundred and sixty-six and two-third dollars ($5,666⅔), it being that amount advanced by him of payment to Kirk balance on concern note, due him 1st day of January last. He is to be paid six per cent. for said amount from date until paid. *This 20th March, 1857.* DAVID I. FIELD & Co."

"Due C. I. Field or order, the sum of eleven hundred dollars ($1,100), it being money this day advanced by paying to William Kirk, through his draft on Hewitt Norton & Co., of New Orleans. *This 5th day of June, 1858.* D. I. FIELD & Co."

"Due C. I. Field or order, one thousand three hundred and eighty-nine dollars and twenty-one one-hundredth dollars ($1,289.29), for value received on settlement to this date, June 13, 1859. D. I. FIELD & Co."

C. I. Field, after the death of D. I. Field, probated the one-half of the amounts stated in these written obligations against the estate of D. I. Field, but died without taking further steps to enforce payment of the same; but after Col. Brutus J. Clay became the administrator, he took steps to have the estate of D. I. Field declared insolvent by the Probate Court of Bolivar County, and obtained a decree of that Court for a sale of the interest which said D. I. Field had in these lands at the time of his death for the payment of the amount claimed to be due upon these obligations from the estate of D. I. Field, being the one-half due upon the four obligations, with interest. The land was offered for sale to the highest bidder—that is, the one-half undivided interest—when the same was struck off to Mrs. Pattie Clay, the complainant, who, as before stated, went into possession of the same, which she still holds, except that portion assigned to Mrs. Lucy Freeman as her dower in said lands. This sale has been held void. The purpose of this

bill is to subject the interest which D. I. Field had in these lands to the payment of the one-half of the amount of these written obligations, with interest, less one-half of whatever may have been received from the rents and profits thereof since the death of said D. I. Field, after payment for taxes, improvements, and other charges against said lands. These written obligations are not copied from the originals, which it is alleged were destroyed by fire, but from copies shown to have been taken from them before their destruction. The defendants claim, first, that the due-bill dated June 13, 1859, was taken from the balance then due on the three former obligations, and to close all accounts and indebtedness then due from the firm to said C. I. Field up to that date. It was evidently given to close some settlement, but what was included in it is uncertain, both parties being now dead, and there being no one to explain the transaction. The proof does not show sufficient means belonging to the firm to pay off this indebtedness and the other liabilities of the firm shown to have existed; therefore I conclude it did not embrace them. There is other proof going to show an indebtedness from the firm to C. I. Field after the death of D. I. Field.

It is insisted upon the part of the defendants, that if these obligations were not paid at the death of D. I. Field, that they were canceled by the negligence of C. I. Field as surviving partner to sell so much of the personal property, including, if necessary, the slaves, to pay off this indebtedness which it is insisted should have been done during the year 1860, when such property brought a high price, and before its destruction; that this personal property was then of much larger value than the amount due on these obligations, and all other indebtedness of the firm. I am satisfied from the proof that this indebtedness did exist against the firm, but not against D. I. Field individually, and that all the attempted proceeding to collect the same against the estate of D. I. Field by a sale of the lands was based upon a mistaken theory, and without authority, and are consequently void. Upon the death of C. I. Field the title to all the personal property, including the

slaves, belonging to the firm, vested in C. I. Field, as surviving partner, whose duty it was to have sold so much of it, within a reasonable time, to pay off this and all other indebtedness against the firm. This he had the power to do, without the order or decree of any Court, either publicly or privately, and if that was insufficient might have sold so much of the land as was necessary in the same way. The legal title to the lands was vested in said C. I. Field and the defendant D. I. Field, to be sure; but the equitable title was vested in C. I. Field, for the purpose of paying off the indebtedness due himself, as well as all others, including any balance due him on settlement of the partnership accounts, and a Court of Equity would have compelled D. I. Field, the defendant, to convey the legal title to the purchaser. This question was fully settled in the case of Shanks *v.* Klein, 104 U. S. 18, and reference to other authorities is unnecessary on this point. The question is, did C. I. Field, by this neglect, render himself liable for the loss of this personal property, and the value of the slaves, as to the interest of defendants therein, or estop himself from setting up the claim here made? Considering the relationship of the parties, and all the circumstances, it would perhaps be inequitable to hold to so strict a rule; but I am satisfied that he had no power to continue the operation of the plantation with the firm slaves, mules, and other property belonging to the firm, as a continuation of the firm business, during the years 1861, 1862, and 1863, and that he was liable for a reasonable rent for the land and hire of the slaves, stock, and other property used in the cultivation of the plantation during the years 1861 and 1862, to be applied to the payment of these obligations—no other indebtedness is shown now to exist—and that, as C. I. Field and his administrator, Brutus J. Clay, and the complainant, since her attempted purchase, has been in the possession of all the lands, with the exception of Mrs. Freeman's dower, since its assignment, the complainant must be charged with a reasonable rent for the lands and the hire of the slaves, mules, and other property used in making the crops of 1861 and 1862,

and for a reasonable rent of the lands since the 1st of January, 1866, omitting the years 1863, 1864, and 1865; that such rents, and those for 1861 and 1862, be credited upon the amount due upon the obligations given to said C. I. Field, with interest up to the 1st of January, 1863, and that the rents accruing commencing with the 1st of January, 1866, with interest for 1866, on the 1st day of January, 1867, and so on from year to year up to the present time. The rents and hire to be estimated at what would be a fair and reasonable rent, or hire to a solvent tenant for cash, taking the plantation and property as a whole, and crediting the complainant, with the amounts paid for taxes and for such improvements as were necessary to rent the lands at a reasonable price; also for the value of such improvements as may have added to the permanent value of the lands—not what they cost, but the value that they permanently may have added to the lands.

It is insisted that the complainant should be considered as a mortgagee in possession, and only chargeable with the rents actually received. I am of opinion that as C. I. Field neglected to sell the personal property when he should have done so, and by which neglect it was wholly lost to the defendants, that complainant is not entitled to be considered as a mortgagee in possession, and only liable for the rent received. The cause must be referred to a master to take and state an account under the rules stated, and report the same to the next term of Court. As C. I. Field was chargeable with the rents and hire for 1861 and 1862, he was entitled to the crops for those years; and, being the sole owner, the loss as a matter of course was his alone.

Brown *v.* Watson, 66 Mich. 223; Gable *v.* Williams, 59 Md. 46; Wentworth's Lindley, 340 n.–343 n.; Nelson *v.* Hayner, 66 Ill. 487; Clay *v.* Freeman, 118 U. S. 97; Grim's Appeal, 105 Pa. St. 375; Case *v.* Abeel, 1 Paige (N. Y.), 393.

5. WINDING UP.

a. As to Partners.

NORMAN *v.* CONN.

Supreme Court of Kansas, 1878.

20 Kan. 159.

HORTON, C. J. This was an action brought by R. E. Conn, one member of a firm, for an accounting with the other two members, J. T. Norman and W. M. Ingham, and to recover a balance which he claimed due him. The case was referred to a special referee, who was directed to hear all questions of fact and law in the cause; and thereafter such referee made and filed his report, to the effect—

That a partnership was formed between plaintiff and defendants, on or about the 1st of December, 1873, for the purpose of wintering cattle, said partnership to relate back to some time in October of said year, at which time defendants commenced said business; that the parties were to share equally, each having all their interests in the business and profits thereof; that plaintiff paid to defendants to be put into the business, $663.48; that defendants put into the capital stock and expenses (a large portion of said expenses being paid when money was received for keeping cattle) the sum of $3,028.52, including money paid by plaintiff; that defendants put in stock, and paid expenses at various times, as follows:

Mower, team, wagon and camp utensils,	$370 00
Cash paid hands,	585 00
Cash paid keeping cattle,	584 00
Feed for horses,	30 45
Norman's trips to Ellsworth,	69 35
Merchandise $659.12, less $328 paid Marshall,	331 72
Cash paid Collins and Craig,	58 00
Norman's wages, 10 months at $100,	1,000 00
Total disbursements,	$3,028 52

That the defendants from all sources received as follows:

Cash for keeping cattle,	$2,818 35
From R. E. Conn, as per receipt,	663 48
Total receipts,	$3,481 83
Disbursements brought down,	3,028 52
Receipts in excess of outlay,	$453 31

That plaintiff received from defendants $400 about the time the cattle-keeping was paid for, to wit, July 1, 1874; that a balance of $275 due the firm from cattle-owners remained uncancelled; that there ramained in the hands of defendants, the team, wagon, mower, and camp outfit; that defendants had entire charge of the business.

And upon the evidence the referee further reported, that said plaintiff was entitled to recover against said defendants the sum of $414.58, with interest from July 1, 1874, at 7 per cent., together with his one-third of the profits now in the hands of defendants; and that plaintiff was also entitled to the further sum of $91.67 when the $275 yet due should be collected. And the referee therefore found for the plaintiff, the said sum of $414.58, with interest as aforesaid, together with his one-third interest in the property in the hands of defendants, and the further sum $91.67 when the same shall have been collected. The report of the referee was confirmed by the Court, and judgment rendered in favor of the defendant in error, Conn, for $414.58, with interest from July 1, 1874, and the plaintiffs in error were ordered to account to said Conn for one-third of the property mentioned in the report, and for one-third of the $275.

Plaintiffs in error object to the report and the judgment, on the ground that the facts found do not entitle the defendant in error to the judgment obtained. The finding of the referee in regard to the agreement of the partners as to how the partnership property and effects were to be divided upon the winding up of their business, is not as clear and precise as it should have been; but as this finding is unquestioned, and none of the testimony is before us, we shall construe it as fairly

and equitably as possible to all the parties concerned. The referee reported that "the parties were to share equally, each having all their interests in the business and profits thereof." With this finding, and in view of all the circumstances attending the transactions of the business in which they were engaged, and the results of the same, we think each party would be entitled to a return of his individual capital, and that each should share equally with the others in the profits. The question as to the balance due Conn on the dissolution of the firm is one of computation only. Conn furnished as capital, $663.48; Norman and Ingham furnished as capital $370, in the way of a mower, team, and camp utensils. The total assets, or capital of the firm furnished by the partners were only $1,033.48. The balance of the $3,028.52 paid out by the plaintiffs in error for wages, expenses, etc., was money received from keeping cattle, being the business in which the firm was engaged. The condition of the partnership was as follows:

Capital,	$1,033 48
Cash received for keeping cattle,	2,815 35
Accounts due the firm,	275 00
Total,	$4,126 73
The expenses of the firm were,	2,658 52

The expenses taken from the said $4,126.73, leave $1,468.21 to the firm to be divided. If Conn is to have his original capital back, and Norman and Ingham theirs, then there is left $434.73 as the profits of the business, which divided equally between the three parties, gives to each $144.91. If, on July 1, 1874, the property of the partners had been all in money, Conn would have been entitled to have received back his $663.48, and $144.91, his one-third of the profits. This is on the basis that the $275 had been collected, and that the property mentioned in the report had sold for its original value of $370.

As the accounts have not been collected, nor the personal property sold, all that we can do is to remand the case with instructions to the District Court to render judgment for Conn

for the balance of his capital, to wit, $263, with interest from July 1, 1874, and to direct a sale of the personal property and collection of the accounts, and to award to Conn, the defendant in error, the one-third of the profits, which, if the accounts are collected and a sale is made of the property for $370, will be $144.91, and proportionally less if there is any loss on the accounts, or depreciation in value of the personal property. The costs of this Court will be divided between the parties.

Taylor *v.* Coffing, 18 Ill. 422; Livingstone *v.* Blanchard, 130 Mass. 341; Hanks *v.* Baber, 53 Ill. 292.

In the absence of partial settlements the accounting should commence with the beginning of the joint dealings, ceasing only with closing of the partnership dealings. One partner who has paid more than his share of the losses is to be paid the excess, and in the case of insolvency of a copartner can compel indemnity from the remaining solvent ones: Whitman *v.* Porter, 107 Mass. 522; Archer *v.* Walker, 38 Ind. 472; Scott *v.* Bryan, 96 N. Car. 289.

No extra compensation will be allowed a partner who does a larger share of the work of the firm than his copartner: Stratton *v.* Tabb, 8 Ill. Ap. 225–227; Denver *v.* Roane, 99 U. S. 355; Godfrey *v.* White, 43 Mich. 171.

Interest is not allowed prior to a final ascertainment of balances, nor on money in a partner's hands: Gilman *v.* Vaughan, 44 Wis. 646.

In the accounting each partner will be charged for losses caused by the culpable neglect of duty, breach of good faith or partnership agreement: Soules *v.* Burton, 36 Vt. 652; Maher *v.* Bull, 44 Ill. 97; Duvall *v.* Burbridge, 6 W. & S. (Pa.) 529.

In the accounting each partner will be credited with every item of expense incurred by him in the partnership business: King *v.* Hamilton, 16 Ill. 190; Coddington *v.* Idell, 29 N. J. Eq. 504; Newell *v.* Humphrey, 37 Vt. 265.

When a partner engages firm property in private speculation the profits are the firm's and the losses fall on the speculating partner: Todd *v.* Rafferty, 30 N. J. Eq. 254; Bast's Appeal, 70 Pa. St. 301; Chittenden *v.* Whitbeck, 50 Mich. 401.

"In distributing the proceeds the following order of priority obtains:

"1. The debts or liabilities due to third persons.

"2. In paying to each partner his advances, for as to these he is a creditor *inter se.*

"3. In repaying to each partner his capital.

"4. Dividing the balance as profits:" Bates, § 811.

b. As to Third Parties.

RODGERS *v.* MERANDA.

Supreme Court of Ohio, 1857.

7 Ohio St. 180.

THE original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record, that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of his individual creditors, in proportion to the amount of their respective demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities, in full. At the date of his failure and assignment, he was a partner with John W. Dever, in a mercantile firm, under the name and style of Dever & Murray; which firm had also become insolvent, and likewise Dever; and the firm had made an assignment of the partnership property and assets, about the same time, to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs, the partnership creditors, although they have filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claim the right to be admitted to a participation in the dividends of the separate estate of Murray, *pari passu* with his individual creditors; while the latter deny the right, and insist that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appears further, that Murray, besides advancing his part of the capital of the firm, also loaned money to the firm to a large amount, for which he held the obligations of the firm, which obligations, by the assignment of Murray, came into

the hands of the plaintiff, who has presented the same to the assignee of the firm, and claims to have the same paid out of the assets of the firm, *pari passu* with the other partnership debts. The other creditors resist this, and plaintiff asks an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The Court below sustained the demurrer, and gave judgment in favor of the defendants. And this petition in error is filed to review and reverse that judgment.

BARTLEY, C. J. Two questions are presented for determination in this case. The first is, whether in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled, that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects; so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm; and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. As this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, *in equity*, only look to the surplus of the separate property of a partner, after the payment of his individual debts; and, on the other hand, the individual creditors of a partner can, in like manner, only claim distribution from the debtor's interest in the surplus of the joint fund, after the satisfaction of the partnership creditors. The correctness of this

rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those Courts which have adhered to it. By some, it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm; while in contracts with a partner as an individual, reliance is supposed to be placed on his separate responsibility: 3 Kent Com. 65. And again, others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner; and that there is consequently a clear equity in confining the creditors, as to preferences, to each estate respectively, which has been thus benefited by their transactions: 1 Harr. & Gill Rep. 96. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than mere considerations of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm; and also, those who contract with a partner in his separate capacity, place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What then is the true foundation of the rule which gives

the individual creditor a preference over the partnersh creditor, in the distribution of the separate estate of a partne To say that it is a rule of general equity, as has been som times said, is not a satisfactory solution of the difficulty; t the very question is, whether it be a rule of equity or not. the distribution of the assets of insolvents, equality is equit and to say that the rule which gives the individual creditor preference over the partnership creditor in the separate esta of a partner is a rule of equality, does not still rid the subje of difficulty. For leaving the rule to stand, which gives tl preference to the joint creditors in the partnership propert and perfect equality between the joint and individu creditors, is, perhaps, rarely attainable. That it is, howeve more equal and just, as a general rule, than any other whic can be devised, consistently with the preference to the partne ship creditors in the joint estate, cannot be successfully co troverted. It originated as a consequence of the rule priority of partnership creditors in the joint estate, and for tl purpose of justice, became necessary as a correlative rul With what semblance of equity could one class of creditors, preference to the rest, be exclusively entitled to the partnersh fund, and, concurrently with the rest, entitled to the separa estate of each partner? The joint creditors are no mo meritorious than the separate creditors; and it frequently ha pens, that the separate debts are contracted to raise means carry on the partnership business. Independent of this rul the joint creditors have, as a general thing, a great advanta over the separate creditors. Besides being exclusively entitl to the partnership fund, they take their distributive share the surplus of the separate estate *of each of the several partne* after the payment of the separate creditors of each. It is rule of equity, that where one creditor is in a situation to ha two or more distinct securities or funds to rely on, the Cou will not allow him, neglecting his other funds, to attach hir self to one of the funds to the prejudice of those who have claim upon that, and no other to depend on. And besides tl advantage which the joint creditors have, arising from tl

fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it; and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them, which the separate creditors have not; they can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid eighty per cent. on their debts, out of the joint fund, to come in *pari passu* with the individual creditors of one of the partners, whose separate property will not pay twenty per cent. to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property. And that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate, results, as a principle of equity, from the preference of partnership creditors in the partnership funds, and their

advantages in having different funds to resort to, while the individual creditors have but the one.

It has been argued that partnership contracts are *several* as well as *joint*, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right of partnership creditors against the separate property of individual partners *in proceedings at law*, is not in controversy. The question here relates to the *relative equitable rights* of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights of creditors in proceedings at law, with their relative rights to an equitable adjustment in marshaling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for near a century and a half. We find it distinctly recognized in the case of *Ex parte* Crowder, 2 Vernon, 706, decided in 1715. And in *Ex parte* Cook, 2 Peer Williams, 500, Lord Chancellor KING declared it settled as a rule of convenience in bankruptcy that joint creditors should be first paid out of the partnership estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate after paying the joint creditors, the share of each partner should be distributed to his separate creditors; and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord HARDWICKE followed the same rule, in *Ex parte* Hunter, 1 Atkins, 228. But it appears that in *Ex parte* Hodgson, 2 Bro. ch. c., decided in 1785, Lord THURLOW made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors; that they ought to be paid out of the bankrupt's estate, and his moiety of the joint estate; and that the joint creditors ought to come in *pari passu* with the separate creditors. This ruling of Lord THURLOW appears to have had reference to proceedings at law, and in

bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners, and obtaining an injunction on the order in bankruptcy. But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord LOUGHBOROUGH, in *Ex parte* Elton, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the case of Hodgson, was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order, and secure the application of the separate estate to the satisfaction of the separate debts; and although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom, until the amount of his distribution in the joint fund could be ascertained, and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, puts an end to the assertion, which has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this, he said: "If it stands as a rule of law, we must consider, what I have always understood to be settled by a vast variety of cases, not only in bankruptcy, but *upon general equity*, that the joint estate is applicable to partnership debts, and the separate estate to the separate debts." Again, in speaking of the inconvenience of Lord THURLOW's rule, he said, "What I order here to-day, sitting in bankruptcy, I shall forbid to-morrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. *The plain rule of distribution is that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed.*"

Lord ELDON, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor: Chiswell *v.* Gray, 9 Ves. 126; Dutton *v.* Morrison, 17 Ves. 207.

And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy, in England, is a mistake; it was long and well settled as a rule of equity, before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until the statute of 6 Geo. IV, c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the Courts of the several States in this country.

In Pennsylvania the rule was discarded, by a majority of the Court, in the case of Bell *v.* Newman, 5 Serg. & R. 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property; and that, then, the balance of the separate property should be divided *pro rata* among both classes of creditors. This was placed partly on the ground of equity, and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge GIBSON, however, dissented, insisting forcibly on the rule adopted in England, as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case, was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice TILGHMAN remarked, in the opinion of the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of Sperry's Estate, 1 Ashmead, did not directly affect the question, inasmuch as it came fully within the exception, that where there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the Court in that State, in Walker *v.* Eyth, 25 Pa. St. 216, where the Court express the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors, and the separate estate to the separate creditors." But the question was not directly decided, the decision of the case being put upon another ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania: 1 Amer. Leading Cases, 483.

In Virginia the question was presented in 1848, in the case of Morris's Adm'r *v.* Morris's Adm'r, 4 Grattan Rep. 293, and was elaborately discussed on both sides, but the Court was equally divided on the question of the adoption of the rule as a general rule of equity, and the decision of the case was put on other grounds.

In New Jersey, in the case of Wisham *v.* Lippincott, 1 Stockton's Ch. Rep. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of Bardwell *v.* Perry *et al.*, 19 Verm. Rep. 292, the rule was discarded as a principle of equity, with this qualification, that the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a *pro rata* distribution out of his separate estate.

It does not appear that the doctrine of the English Courts on this subject was ever adopted as a rule of equity by the Courts in Massachusetts; but it is said that a statute was enacted in that State, in 1838, providing, as a rule for the dis-

tribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors, and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of Camp *v.* Grant *et al.*, 21 Conn. Rep. 41 ; and also in Mississippi, in the case of Dahlgran, Adm'r, *v.* Duncan, 7 Sm. & Mars. Rep. 280 ; but adopted in Alabama in Bridge *v.* McCullough, 27 Ala. Rep. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm ; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything therefrom :" Jackson *v.* Cornell, 1 Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor KENT, in Murray *v.* Murray, 5 John. Ch. Rep. 60, and, upon full consideration, adopted as a rule of equity, by Chancellor WALWORTH, in Wilder *v.* Keeler, 3 Paige, 517 ; Payne *v.* Matthews, 6 Paige, 19 ; Hutchinson *v.* Smith, 7 Ib. 26.

The same doctrine was adopted by Chancellor DESAUSSURE, in South Carolina, as early as 1811, in Woddrop *v.* Ward, 3 Des. Eq. Rep. 203 ; and also by the Supreme Court of New Hampshire, in Jarvis *v.* Brooks, 3 Foster Rep. 136.

The subject was very fully reviewed in the Court of Appeals of Maryland, in McCulloh *v.* Dashiell's Adm'r, 1 Harr. & Gill, 96, wherein it was settled in that State that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in the distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in Murrill *et al. v.* Neill *et al.*, 8 How. 414.

It has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of

equity. Story, in his work on Partnership, ch. 15, §§ 365 and 366, says:

"This principle of equity jurisprudence, that the joint creditors shall be entitled to a priority of payment out of the joint effects, and the separate creditors to a like priority out of the separate effects, before the other class of creditors shall be entitled to any portion of the surplus, is not, perhaps, under all its aspects, so purely artificial, as it has sometimes been suggested to be; at least, it has been often relied upon, as the dictate of *natural justice.*"

It is true, the same author, in § 377, of his same work, qualifies this opinion as follows:

"'This rule, although now firmly established,' 'stands as much, if not more, upon the general ground of *authority*, and the maxim, *stare decisis*, than upon the ground of any equitable reasoning,' and further, that 'After the repeated doubts which have been expressed upon the subject by the most eminent Judges, it is not, perhaps, too much to say that it rests on a foundation as questionable and as unsatisfactory as any rule in the whole system of our jurisprudence.'"

And he adds:

"Such as it is, however, it is for the public repose that it should be left undisturbed, as it *may not be easy to substitute any other rule, which would uniformly work with perfect equality and equity* in the mass of intricate transactions connected with commercial operations."

Kent, in his Commentaries, 3 vol., 65, says:

"The joint creditors have the primary claim upon the joint fund in the distribution of the assets of bankrupts or *insolvent* partners, and the partnership debts are to be settled before any division of the funds takes place. So far as the partnership property has been acquired by means of partnership debts, those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. *The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts.* It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property, until all the partnership creditors are satisfied."

It is argued, however, that this doctrine was overruled in

Ohio, in the case of Grosvenor *v.* Austin, 6 Ohio Rep. 104. It is true, that the reasoning of the Court in the opinion, is to that effect; but the case decided falls within one of the acknowledged exceptions to the rule. Where the partnership has become insolvent, and there are no partnership assets for distribution, and no living solvent partner, it has been uniformly conceded that the principle of the rule does not apply. The case of Grosvenor *v.* Austin was a bill in equity by the creditors of the firm of Seymour Austin & Calvin Austin, for a distributive share with the individual creditors of Seymour Austin out of the assets of his separate estate in the hands of his administrator. There were no partnership assets, and both parties had died insolvent. This was not a case, therefore, for the application of the principle under consideration. And Judge LANE, in delivering the opinion, says, as to this rule: "This Court are of opinion, that if any such rule exist, it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books, except the one in 9 Vesey, and the South Carolina case, that touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel, in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy," etc. Touching the subject of this *obiter* opinion, the following remarks of the Supreme Court of the United States, in Murrill *v.* Neill, are in point:

"The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice; it is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: that partnership creditors shall, in the first instance, be satisfied from the partnership estate; and separate or private creditors of the individual partners from the separate and private estate of the

partners with whom they have made private and individual contracts; and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the Court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule, to stay the hand of innovation at this day; at least, under any motive less strong than the most urgent propriety."

It has been argued that the statute in this State, relative to the equal distribution of the estates of deceased persons, and also the statute providing that all assignments of property in contemplation of insolvency, giving preferences to creditors, had established, in this State, a policy inconsistent with the rule in question. These statutes were certainly never intended to have such an effect. The equality required by them is subordinate to the settled equities and priorities of different grades and classes of creditors. It was manifestly not the design of these statutes to change the nature of partnership contracts, and abrogate the preference of partnership creditors in the distribution of the partnership assets. And as this was not done, the rule of equality adopted in equity, requires the corresponding preference to be given to the individual creditors of each partner in his separate estate.

The remaining matter for determination, in this case, involves the inquiry, whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a *pro rata* distribution with the partnership creditors, out of the joint fund. It is claimed that the liability of the firm to a partner for money loaned is a partnership debt, and that the individual creditors of that partner are, in equity, entitled to an equal distribution therefor, out of the partnership property. On the other hand, it is claimed that as each partner is individually liable for the debts of the firm, and as no partner can be allowed to participate with his own

creditors in the distribution of a fund, the separate creditors of a partner, as they can only claim through the rights of their debtor, cannot be allowed such participation with the joint creditors.

It was at one time held to be the law, on the authority of adjudications by Lord TALBOT and Lord HARDWICKE that if a partner has loaned money to the partnership, or the partnership has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case, the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money lent; and that, in the latter case, the partnership creditors would be entitled to payment to the same extent, out of the individual estate of the partner: *Ex parte* Hunter, 1 Atk. 223; Story on Part., § 390. But this doctrine has long since been overruled; and the contrary appears now to be well settled. In *Ex parte* Lodge, 1 Ves. Jr. 166, Lord THURLOW held that the assignees on behalf of the joint estate could not be entitled to distribution out of the separate estate of Lodge, for money which he had abstracted from the partnership, unless he had taken it with a fraudulent intent to augment his separate estate. And in *Ex parte* Harris, 2 Ves. and Beam. R. 210, 212, Lord ELDON said: "There has long been an end of the law which prevailed in the time of Lord HARDWICKE, whose opinion appears to have been that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other, in each case. That has been put an end to, among other principles, upon this certainly, that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so, if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate;

that is, in each case no proof to affect the creditors, though the individual partners may certainly have the right against each other."

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects where there are conflicting claims; and that, inasmuch as an individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership but also of himself; therefore the separate creditors of a partner could not enforce any claim to a distributive share of the joint effects against the partnership creditors, which could not have been enforced by the partner himself for his own benefit: Story on Partnership, § 390. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency, is to be received with this important limitation, that it does not apply in case, either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate estate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the Common Pleas reversed; and ordered that the separate effects of Peter Murray be distributed *pro rata* first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray; and that the partnership effects be applied

first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, for money loaned by him to the firm.

Doggett *v.* Dell, 108 Ill. 560; Parsons, 383; Davis *v.* Howell, 33 N. J. Eq. 72; Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288; Peters *v.* Bain, 133 U. S. 670.

Creditors have no lien on the partnership property other than any creditor has against the property of the debtor, except as derived through the partnership equity which is a lien each partner has to have the partnership assets applied to pay joint debts. The lien arises on an implied contract that the assets shall not be used for private purposes and on the doctrine of partnership: Edwards *v.* Remington, 60 Wis. 33; Palmer *v.* Tyler, 15 Minn. 106; Case *v.* Beauregard, 99 U. S. 119; Fitzpatrick *v.* Flannagan, 106 U. S. 648.